WEST Search History

DATE: Thursday, August 29, 2002

Set Name side by side	Query	Hit Count	Set Name result set
DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ			
L7	l5 and (sens$3 or determin$7) near5 (access$3 or request$3) near5 (document or data or file or information or paper or program)	8	L7
L6	l5 and (sens$3 or determin$7) near5 request$3 near5 (document or data or file or information or paper or program)	6	L6
L5	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership or property) near5 (fee or charge or money)	502	L5
L4	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership) near5 (fee or charge or money)	66	L4
L3	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownerchip) near5 (fee or charge or money)	55	L3
DB=USPT; PLUR=YES; OP=ADJ			
L2	(5721779 or 6178508 or 5953422 or 5666415).pn.	4	L2
DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ			
L1	nn880530	1	L1

END OF SEARCH HISTORY

WEST Search History

DATE: Thursday, August 29, 2002

Set Name side by side	Query	Hit Count	Set Name result set
DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ			
L7	l5 and (sens$3 or determin$7) near5 (access$3 or request$3) near5 (document or data or file or information or paper or program)	8	L7
L6	l5 and (sens$3 or determin$7) near5 request$3 near5 (document or data or file or information or paper or program)	6	L6
L5	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership or property) near5 (fee or charge or money)	502	L5
L4	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership) near5 (fee or charge or money)	66	L4
L3	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownerchip) near5 (fee or charge or money)	55	L3
DB=USPT; PLUR=YES; OP=ADJ			
L2	(5721779 or 6178508 or 5953422 or 5666415).pn.	4	L2
DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ			
L1	nn880530	1	L1

END OF SEARCH HISTORY

WEST Search History

DATE: Thursday, August 29, 2002

Set Name side by side	Query	Hit Count	Set Name result set
	DB=USPT; PLUR=YES; OP=ADJ		
L10	(collect$3 or calculat$3 or comput$3) near5 royalty and sens$3 same (document or data or information or file or music or video or program) same (request$3 or play$3 or obtain$5)	16	L10
L9	(collect$3 or calculat$3 or comput$3) near5 royalty and sens$3 same (document or data or information or file or music or video or program) same request$3	6	L9
L8	(collect$3 or calculat$3 or comput$3) near5 royalty and sens$3	38	L8
	DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ		
L7	l5 and (sens$3 or determin$7) near5 (access$3 or request$3) near5 (document or data or file or information or paper or program)	8	L7
L6	l5 and (sens$3 or determin$7) near5 request$3 near5 (document or data or file or information or paper or program)	6	L6
L5	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership or property) near5 (fee or charge or money)	502	L5
L4	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership) near5 (fee or charge or money)	66	L4
L3	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownerchip) near5 (fee or charge or money)	55	L3
	DB=USPT; PLUR=YES; OP=ADJ		
L2	(5721779 or 6178508 or 5953422 or 5666415).pn.	4	L2
	DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ		
L1	nn880530	1	L1

END OF SEARCH HISTORY

Welcome to DialogClassic Web(tm)

Dialog level 02.08.23D
Last logoff: 19aug02 11:56:41
Logon file405 29aug02 15:49:38

***** ANNOUNCEMENT *****

--File 990 - NewsRoom now contains May 2002 to present records. File 993 - NewsRoom archive contains 2002 records from January 2002-April 2002. To search all 2002 records, BEGIN 990,993 or B NEWS2002.

--Alerts have been enhanced to allow a single Alert profile to be stored and run against multiple files. Duplicate removal is available across files and for up to 12 months. The Alert may be run according to the file's update frequency or according to a custom calendar-based schedule. There are no additional prices for these enhanced features. See HELP ALERT for more information.

--U.S. Patents Fulltext (File 654) has been redesigned with new search and display features. See HELP NEWS 654 for information.

--Connect Time joins DialUnits as pricing options on Dialog. See HELP CONNECT for information.

--CLAIMS/US Patents (Files 340,341, 942) have been enhanced with both a single record. See HELP NEWS 340 for information.

--SourceOne patents are now delivered to your email inbox as PDF replacing TIFF delivery. See HELP SOURCE1 for more information.

--Important news for public and academic libraries. See HELP LIBRARY for more information.

--Important Notice to Freelance Authors--
See HELP FREELANCE for more information

For information about the access to file 43 please see Help News43.

NEW FILES RELEASED
***Dialog NewsRoom - Current 3-4 months (File 990)
***Dialog NewsRoom - 2002 Archive (File 993)
***Dialog NewsRoom - 2001 Archive (File 994)
***Dialog NewsRoom - 2000 Archive (File 995)
***TRADEMARKSCAN-Finland (File 679)
***TRADEMARKSCAN-Norway (File 678)
***TRADEMARKSCAN-Sweden (File 675)

UPDATING RESUMED
***Delphes European Business (File 481)

RELOADED

```
***U.S. Patents Fulltext 1976-current (File 654)
***Population Demographics (File 581)
***Kompass Western Europe (File 590)
***D&B - Dun's Market Identifiers  (File 516)
***PsycINFO (File 11)

REMOVED
***Chicago Tribune (File 632)
***Fort Lauderdale Sun Sentinel (File 497)
***The Orlando Sentinel (File 705)
***Newport News Daily Press (File 747)
***U.S. Patents Fulltext 1980-1989 (File 653)
***Washington Post (File 146)
***Books in Print (File 470)
***Court Filings (File 793)
***Microcomputer Software Guide Online (File 278)
***Publishers, Distributors & Wholesalers of the U.S. (File 450)
***State Tax Today (File 791)
***Tax Notes Today (File 790)
***Worldwide Tax Daily (File 792)

***New document supplier***
                    *** DIALOG HOMEBASE(SM) Main Menu ***

 Information:
  1.  Announcements (new files, reloads, etc.)
  2.  Database, Rates, & Command Descriptions
  3.  Help in Choosing Databases for Your Topic
  4.  Customer Services (telephone assistance, training, seminars, etc.
  5.  Product Descriptions

 Connections:
  6.  DIALOG(R) Document Delivery
  7.  Data Star(R)

    (c) 2000  The Dialog Corporation plc      All rights reserved.

      /H = Help            /L = Logoff          /NOMENU = Command Mode


Enter an option number to view information or to connect to an online
 service.  Enter a BEGIN command plus a file number to search a databas
(e.g., B1 for ERIC).
?
B BUSECON
       29aug02 15:50:34 User268094 Session D16.1
            $0.00    0.226 DialUnits FileHomeBase
     $0.00  Estimated cost FileHomeBase
     $0.20  INTERNET
     $0.20  Estimated cost this search
     $0.20  Estimated total session cost   0.226 DialUnits

SYSTEM:OS  - DIALOG OneSearch
```

File 9:Business & Industry(R) Jul/1994-2002/Aug 28
(c) 2002 Resp. DB Svcs.
File 13:BAMP 2002/Aug W3
(c) 2002 Resp. DB Svcs.
File 15:ABI/Inform(R) 1971-2002/Aug 29
(c) 2002 ProQuest Info&Learning
***File 15: Alert feature enhanced for multiple files, duplicate**
removal, customized scheduling. See HELP ALERT.
File 16:Gale Group PROMT(R) 1990-2002/Aug 28
(c) 2002 The Gale Group
***File 16: Alert feature enhanced for multiple files, duplicate**
removal, customized scheduling. See HELP ALERT.
File 20:Dialog Global Reporter 1997-2002/Aug 29
(c) 2002 The Dialog Corp.
File 30:AsiaPacific 1985-2002/Aug 27
(c) 2002 Aristarchus Knowledge Indus.
File 75:TGG Management Contents(R) 86-2002/Aug W3
(c) 2002 The Gale Group
File 93:TableBase(R) Sep 1997-2002/Aug W2
(c) 2002 Resp. DB Svcs.
File 111:TGG Natl.Newspaper Index(SM) 1979-2002/Aug 28
(c) 2002 The Gale Group
File 139:EconLit 1969-2002/Aug
(c) 2002 American Economic Association
File 148:Gale Group Trade & Industry DB 1976-2002/Aug 29
(c)2002 The Gale Group
***File 148: Alert feature enhanced for multiple files, duplicate**
removal, customized scheduling. See HELP ALERT.
File 160:Gale Group PROMT(R) 1972-1989
(c) 1999 The Gale Group
File 211:Gale Group Newsearch(TM) 2002/Aug 29
(c) 2002 The Gale Group
File 249:PIRA Mgt. & Mktg. Abs. 1976-2002Sep W5
(c) 2002 Pira International
File 466:Info Latino America 1988-1995/Dec W1
(c) 1997 Info-South
***File 466: This is a closed file.**
File 476:Financial Times Fulltext 1982-2002/Aug 29
(c) 2002 Financial Times Ltd
File 481:DELPHES Eur Bus 95-2002/Aug W3
(c) 2002 ACFCI & Chambre CommInd Paris
File 484:Periodical Abs Plustext 1986-2002/Aug W4
(c) 2002 ProQuest
***File 484: SELECT IMAGE AVAILABILITY FOR PROQUEST FILES**
ENTER 'HELP PROQUEST' FOR MORE
File 485:Accounting & Tax DB 1971-2002/Aug W3
(c) 2002 ProQuest Info&Learning
***File 485: SELECT IMAGE AVAILABILITY FOR PROQUEST FILES**
ENTER 'HELP PROQUEST' FOR MORE
File 553:Wilson Bus. Abs. FullText 1982-2002/May
(c) 2002 The HW Wilson Co
File 583:Gale Group Globalbase(TM) 1986-2002/Aug 29
(c) 2002 The Gale Group

```
  File 620:EIU:Viewswire  2002/Aug 29
        (c) 2002 Economist Intelligence Unit
  File 622:EIU Magazines  2000-2002/Aug 23
        (c) 2002 EIU Magazines
  File 624:McGraw-Hill Publications  1985-2002/Aug 29
        (c) 2002 McGraw-Hill Co. Inc
  File 627:EIU: Country Analysis  2002/Aug W3
        (c) 2002 Economist Intelligence Unit
  File 628:Ctry Risk & Forecasts  2002/Aug W3
        (c) 2002 Economist Intelligence Unit
*File 628: Prices are changing Nov. 1.  Please see HELP NEWS628.
  File 629:EIU:BUS. Newsletters  2002/Aug W3
        (c) 2002 Economist Intelligence Unit
*File 629: Prices are changing Nov. 1.  Please see HELP NEWS629.
  File 636:Gale Group Newsletter DB(TM)  1987-2002/Aug 28
        (c) 2002 The Gale Group
  File 637:Journal of Commerce  1986-2002/Aug 27
        (c) 2002 Journal of Commerce Inc

      Set  Items  Description
      ---  -----  -----------
?
S COLLECT? (S) (FEE OR MONEY) (S) COPYRIGHT
Processed  10 of  29 files ...
Processing
Processed  20 of  29 files ...
Completed processing all files
        2996564  COLLECT?
         980379  FEE
        4342253  MONEY
        3874544  COPYRIGHT
     S1    1011  COLLECT? (S) (FEE OR MONEY) (S) COPYRIGHT
?
S S1 AND SENS? (S) REQUEST? (S) (DOCUMENT OR DATA OR INFORMATION OR PRO
Processing
Processing
Processed  10 of  29 files ...
Processing
Processed  20 of  29 files ...
Processing
Completed processing all files
           1011  S1
        3229695  SENS?
        2041017  REQUEST?
        1057287  DOCUMENT
        8158316  DATA
       15093499  INFORMATION
        4830769  PROGRAM
          10028  SENS?(S)REQUEST?(S)(((DOCUMENT OR DATA) OR INFORMATIO
                 OR PROGRAM)
     S2       8  S1 AND SENS? (S) REQUEST? (S) (DOCUMENT OR DATA OR
                 INFORMATION OR PROGRAM)
?
```

T S2/TI

2/TI/1 (Item 1 from file: 16)
DIALOG(R)File 16:(c) 2002 The Gale Group. All rts. reserv.

RUSSIA: PROFILE - BORIS BEREZOVSKY FACES NEW CHARGES.
?
T S2/TI/ALL

2/TI/1 (Item 1 from file: 16)
DIALOG(R)File 16:(c) 2002 The Gale Group. All rts. reserv.

RUSSIA: PROFILE - BORIS BEREZOVSKY FACES NEW CHARGES.

2/TI/2 (Item 1 from file: 20)
DIALOG(R)File 20:(c) 2002 The Dialog Corp. All rts. reserv.

MicroStrategy's CEO Sped to the Brink

2/TI/3 (Item 2 from file: 20)
DIALOG(R)File 20:(c) 2002 The Dialog Corp. All rts. reserv.

Art Lovers in a Panic

2/TI/4 (Item 3 from file: 20)
DIALOG(R)File 20:(c) 2002 The Dialog Corp. All rts. reserv.

Sacrificing as a Path to God

2/TI/5 (Item 1 from file: 148)
DIALOG(R)File 148:(c)2002 The Gale Group. All rts. reserv.

A puzzle even the codebreakers have trouble solving: a clash of interes over the electronic encryption standard.

2/TI/6 (Item 2 from file: 148)
DIALOG(R)File 148:(c)2002 The Gale Group. All rts. reserv.

The scope of permissible coordination between merging entities prior to consummation.

2/TI/7 (Item 1 from file: 484)
DIALOG(R)File 484:(c) 2002 ProQuest. All rts. reserv.

Number-English: A dictionary (A-Alg)

2/TI/8 (Item 1 from file: 636)
DIALOG(R)File 636:(c) 2002 The Gale Group. All rts. reserv.

RUSSIA: PROFILE - BORIS BEREZOVSKY FACES NEW CHARGES.
?

```
      $0.68  Estimated cost File485
             $0.27    0.114 DialUnits File553
      $0.27  Estimated cost File553
             $0.33    0.099 DialUnits File583
      $0.33  Estimated cost File583
             $0.14    0.038 DialUnits File620
      $0.14  Estimated cost File620
             $0.09    0.022 DialUnits File622
      $0.09  Estimated cost File622
             $0.43    0.076 DialUnits File624
      $0.43  Estimated cost File624
             $0.22    0.036 DialUnits File627
      $0.22  Estimated cost File627
             $0.15    0.025 DialUnits File628
      $0.15  Estimated cost File628
             $0.10    0.023 DialUnits File629
      $0.10  Estimated cost File629
             $2.30    0.426 DialUnits File636
                $0.00  1 Type(s) in Format  6 (UDF)
             $0.00  1 Types
      $2.30  Estimated cost File636
             $0.27    0.055 DialUnits File637
      $0.27  Estimated cost File637
             OneSearch, 29 files,  4.819 DialUnits FileOS
      $1.95  INTERNET
     $21.85  Estimated cost this search
     $22.05  Estimated total session cost   5.046 DialUnits

SYSTEM:OS  - DIALOG OneSearch
  File 215:ONTAP(R) ABI/INFORM(R)
         (c) 1999 ProQuest Info&Learning
  File 216:ONTAP(R) Gale Group PROMT(R)
         (c) 1999 The Gale Group
  File 276:ONTAP(R) D&B-Duns Market Identifiers  (Copr. 1997 D&B)
  File 277:ONTAP(R) Investext(R)
         (c) 1992 Thomson Financial Networks
  File 281:ONTAP(R) Gale Group MARS(R)
         (c) 1999 The Gale Group
  File 289:ONTAP(R) DMS/FI Contract Awards
         (c) 1990 Forecast Intl./DMS Inc.
  File 296:TRADEMARKSCAN(R)-Federal(Ontap)
         (c) 1995 Thomson & Thomson
  File 804:ONTAP(R) Chemical Economics Handbook
         (c) 1991 SRI International
  File 805:ONTAP(R) Gale Group Computer DB(TM)
         (c) 1999 The Gale Group

      Set  Items  Description
      ---  -----  -----------
?
S COLLECT? (S) (FEE OR MONEY) (S) COPYRIGHT
           4547  COLLECT?
           5786  FEE
```

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            6776  MONEY
            5328  COPYRIGHT
      S1       1  COLLECT? (S) (FEE OR MONEY) (S) COPYRIGHT
?
T S1/TI/ALL
>>>No matching display code(s) found in file(s): 276, 289

 1/TI/1     (Item 1 from file: 216)
DIALOG(R)File 216:(c) 1999 The Gale Group. All rts. reserv.

Untitled Article
?
T S1/FULL/ALL

 1/9/1     (Item 1 from file: 216)
DIALOG(R)File 216:ONTAP(R) Gale Group PROMT(R)
(c) 1999 The Gale Group. All rts. reserv.

03591312
Untitled Article
Audio Week   January 27, 1992   p. N/A

    BMI  lost  copyright suit against retailers who play music on radio
part  of  demonstration  to  potential  buyers.  BMI had argued that st
should  pay  license fee, but 7th U.S. Appeals Court, Chicago, upheld l
court  decision  in case involving Claire's Stores, women's clothing ch
that rejected BMI claim. BMI collects license fees from broadcast and c
programmers,  among  others,  for  use of music written or performed by
members.  In  separate  actions,  BMI signed new music licensing agreem
with  Family Channel and Comedy Central cable networks. Family Channel
calls  for  BMI and cable company to dismiss suit and countersuit invol
music  licensing.  Both  agreements  cover  all  of  cable networks' us
BMI-licensed music, are retroactive and extend through June 30, with op
for renewal.

THIS IS THE FULL TEXT: Copyright 1992 by WARREN PUBLISHING, INC.
WORD COUNT: 126

COMPANY:
    *Claire's Stores
    Family Channel
    Comedy Central

PRODUCT: *Jewelry Stores (5944000); Cable TV Networks (4834100)
EVENT:   *Patents & Copyrights (37); Licensee & Sales Agreements (38)
COUNTRY: *United States (1USA)
?
```

```
            $0.00  1 Type(s) in Format  2 (UDF)
          $0.00  2 Types
     $0.00  Estimated cost File216
            $0.00    0.042 DialUnits File276
     $0.00  Estimated cost File276
            $0.00    0.054 DialUnits File277
     $0.00  Estimated cost File277
            $0.00    0.048 DialUnits File281
     $0.00  Estimated cost File281
            $0.00    0.030 DialUnits File289
     $0.00  Estimated cost File289
            $0.00    0.048 DialUnits File296
     $0.00  Estimated cost File296
            $0.00    0.030 DialUnits File804
     $0.00  Estimated cost File804
            $0.00    0.048 DialUnits File805
     $0.00  Estimated cost File805
            OneSearch, 9 files,  0.433 DialUnits FileOS
     $1.95  INTERNET
     $1.95  Estimated cost this search
    $24.00  Estimated total session cost   5.478 DialUnits

SYSTEM:OS  - DIALOG OneSearch
  File   9:Business & Industry(R)  Jul/1994-2002/Aug 28
         (c) 2002 Resp. DB Svcs.
  File  13:BAMP  2002/Aug W3
         (c) 2002 Resp. DB Svcs.
  File  15:ABI/Inform(R)  1971-2002/Aug 29
         (c) 2002 ProQuest Info&Learning
*File  15: Alert feature enhanced for multiple files, duplicate
removal, customized scheduling. See HELP ALERT.
  File  16:Gale Group PROMT(R)  1990-2002/Aug 28
         (c) 2002 The Gale Group
*File  16: Alert feature enhanced for multiple files, duplicate
removal, customized scheduling. See HELP ALERT.
  File  20:Dialog Global Reporter  1997-2002/Aug 29
         (c) 2002 The Dialog Corp.
  File  30:AsiaPacific  1985-2002/Aug 27
         (c) 2002 Aristarchus Knowledge Indus.
  File  75:TGG Management Contents(R)  86-2002/Aug W3
         (c) 2002 The Gale Group
  File  93:TableBase(R) Sep  1997-2002/Aug W2
         (c) 2002 Resp. DB Svcs.
  File 111:TGG Natl.Newspaper Index(SM)  1979-2002/Aug 28
         (c) 2002 The Gale Group
  File 139:EconLit  1969-2002/Aug
         (c) 2002 American Economic Association
  File 148:Gale Group Trade & Industry DB  1976-2002/Aug 29
         (c)2002 The Gale Group
*File 148: Alert feature enhanced for multiple files, duplicate
removal, customized scheduling. See HELP ALERT.
  File 160:Gale Group PROMT(R)  1972-1989
         (c) 1999 The Gale Group
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  File 211:Gale Group Newsearch(TM)  2002/Aug 29
         (c) 2002 The Gale Group
  File 249:PIRA Mgt. & Mktg. Abs.  1976-2002Sep W5
         (c) 2002 Pira International
  File 466:Info Latino America  1988-1995/Dec W1
         (c) 1997 Info-South
*File 466: This is a closed file.
  File 476:Financial Times Fulltext  1982-2002/Aug 29
         (c) 2002 Financial Times Ltd
  File 481:DELPHES Eur Bus  95-2002/Aug W3
         (c) 2002 ACFCI & Chambre CommInd Paris
  File 484:Periodical Abs Plustext  1986-2002/Aug W4
         (c) 2002 ProQuest
*File 484: SELECT IMAGE AVAILABILITY FOR PROQUEST FILES
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         (c) 2002 ProQuest Info&Learning
*File 485: SELECT IMAGE AVAILABILITY FOR PROQUEST FILES
ENTER 'HELP PROQUEST' FOR MORE
  File 553:Wilson Bus. Abs. FullText  1982-2002/May
         (c) 2002 The HW Wilson Co
  File 583:Gale Group Globalbase(TM)  1986-2002/Aug 29
         (c) 2002 The Gale Group
  File 620:EIU:Viewswire  2002/Aug 29
         (c) 2002 Economist Intelligence Unit
  File 622:EIU Magazines  2000-2002/Aug 23
         (c) 2002 EIU Magazines
  File 624:McGraw-Hill Publications  1985-2002/Aug 29
         (c) 2002 McGraw-Hill Co. Inc
  File 627:EIU: Country Analysis  2002/Aug W3
         (c) 2002 Economist Intelligence Unit
  File 628:Ctry Risk & Forecasts  2002/Aug W3
         (c) 2002 Economist Intelligence Unit
*File 628: Prices are changing Nov. 1.  Please see HELP NEWS628.
  File 629:EIU:BUS. Newsletters  2002/Aug W3
         (c) 2002 Economist Intelligence Unit
*File 629: Prices are changing Nov. 1.  Please see HELP NEWS629.
  File 636:Gale Group Newsletter DB(TM)  1987-2002/Aug 28
         (c) 2002 The Gale Group
  File 637:Journal of Commerce  1986-2002/Aug 27
         (c) 2002 Journal of Commerce Inc

      Set  Items  Description
      ---  -----  -----------
?
S COLLECT? (S) ROYALTY (S) (FEE OR CHARGE OR MONEY)
Processing
Processed  10 of  29 files ...
Processing
Processed  20 of  29 files ...
Completed processing all files
        2996564  COLLECT?
         198392  ROYALTY
```

```
          980379  FEE
         2166259  CHARGE
         4342253  MONEY
      S1    1069  COLLECT? (S) ROYALTY (S) (FEE OR CHARGE OR MONEY)
?
S S1 AND (DOCUMENT OR DATA OR PROGRAM OR FILE OR MUSIC OR MOVIE) (S) RE
Processing
Processed  10 of  29 files ...
Processing
Processed  20 of  29 files ...
Processing
Completed processing all files
           1069  S1
        1057287  DOCUMENT
        8158316  DATA
        4830769  PROGRAM
        1093304  FILE
        1398624  MUSIC
         548353  MOVIE
        2041017  REQUEST?
         281469  ((((DOCUMENT OR DATA) OR PROGRAM) OR FILE) OR MUSIC)
                 MOVIE)(S)REQUEST?
      S2      54  S1 AND (DOCUMENT OR DATA OR PROGRAM OR FILE OR MUSIC
                 MOVIE) (S) REQUEST?
?
S S2 AND SENS?
             54  S2
        3229695  SENS?
      S3     13  S2 AND SENS?
?
T S3/TI/ALL

 3/TI/1     (Item 1 from file: 20)
DIALOG(R)File  20:(c) 2002 The Dialog Corp. All rts. reserv.

Liberty Vs. Royalties


 3/TI/2     (Item 2 from file: 20)
DIALOG(R)File  20:(c) 2002 The Dialog Corp. All rts. reserv.

TSX Venture Exchange - Daily Notice for 02/04/24


 3/TI/3     (Item 1 from file: 148)
DIALOG(R)File 148:(c)2002 The Gale Group. All rts. reserv.

Wildlife utilization: a new international mechanism for the protection
biological diversity.


 3/TI/4     (Item 2 from file: 148)
DIALOG(R)File 148:(c)2002 The Gale Group. All rts. reserv.
```

WEST Search History

DATE: Thursday, August 29, 2002

Set Name side by side	Query	Hit Count	Set Name result set
DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ			
L16	L13 and l5	4	L16
L15	L14 and l5	0	L15
L14	((709/217)!.CCLS.)	1428	L14
L13	((705/52)!.CCLS.)	195	L13
L12	L11 not l10	4	L12
L11	(collect$3 or calculat$3 or comput$3) near5 royalty and sens$3 same (document or data or information or file or music or video or program) same (request$3 or play$3 or obtain$5)	20	L11
DB=USPT; PLUR=YES; OP=ADJ			
L10	(collect$3 or calculat$3 or comput$3) near5 royalty and sens$3 same (document or data or information or file or music or video or program) same (request$3 or play$3 or obtain$5)	16	L10
L9	(collect$3 or calculat$3 or comput$3) near5 royalty and sens$3 same (document or data or information or file or music or video or program) same request$3	6	L9
L8	(collect$3 or calculat$3 or comput$3) near5 royalty and sens$3	38	L8
DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ			
L7	l5 and (sens$3 or determin$7) near5 (access$3 or request$3) near5 (document or data or file or information or paper or program)	8	L7
L6	l5 and (sens$3 or determin$7) near5 request$3 near5 (document or data or file or information or paper or program)	6	L6
L5	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership or property) near5 (fee or charge or money)	502	L5
L4	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownership) near5 (fee or charge or money)	66	L4
L3	(determin$6 or collect$3 or calculat$3 or comput$3) near5 (copyright or copy right or ownerchip) near5 (fee or charge or money)	55	L3
DB=USPT; PLUR=YES; OP=ADJ			
L2	(5721779 or 6178508 or 5953422 or 5666415).pn.	4	L2
DB=USPT,PGPB,JPAB,EPAB,DWPI,TDBD; PLUR=YES; OP=ADJ			
L1	nn880530	1	L1

END OF SEARCH HISTORY

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The emerging international tax environment for electronic commerce

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ABSTRACT: Many governments, and organizations like the Organization for Economic Cooperation & Development, are taking a long-term view of both the appropriate tax policies and the role of tax authorities with respect to electronic commerce. The OECD has engaged the business community in a productive dialogue on the taxation of e-commerce. This positive regulatory and legislative environment is a direct result of the infectious enthusiasm generated by the Internet and the desire to grow this remarkable but fragile business model. For e-commerce to continue to thrive, tax rules must be created that are clear, easily administered, and no more economically burdensome than the current system of taxation. Withholding taxes, or even the paperwork associated with exemptions from withholding tax, would create a paper deluge that even the most sophisticated corporations would be incapable of handling.

TEXT: INTRODUCTION

The Internet is changing people's lives. Its future impact will surely be even more dramatic and, whether or not one believes all of the hype, it is fascinating to consider the possibilities. One look at the financial press and stock market highlights that the commercial aspects of the Internet are creating, seemingly overnight, multi-billion dollar valuations for entirely new Internet businesses that were inconceivable even one year ago. On the other hand, investors punish businesses that lack a current Internet strategy.

The shift in business models to incorporate electronic commerce (or e:commerce), as well as the stratospheric stock market valuations of Internet business fueled by great expectations of future growth, have naturally attracted the attention of both private sector tax professionals and government tax authorities. Corporate tax executives recognized several years ago that e:commerce would create both compliance challenges and planning opportunities while tax authorities became concerned that the freewheeling, jurisdiction-blind nature of e:commerce would erode their tax bases. The current general consensus among business tax professionals is that existing tax rules can accommodate e:commerce transactions and therefore the compliance challenges will be resolved and planning opportunities will be pursued in the normal course of business. While tax

authorities also tend to agree that existing tax rules can be applied to e:commerce, they are not yet convinced that they have identified all of the potential chinks in their armor and quantified the related potential loss of tax revenue. This uncertainty continues to fuel a significant policy debate on the taxation of e:commerce at the international, national and sub-national levels.

The authors intend to introduce interested tax professionals to the tax aspects of electronic commerce. We hope to provide enough information on the background, current status, and expected future work on e:commerce taxation to help the reader evaluate the possible impact on his or her areas of responsibility. In addition, we offer suggested solutions to several of the more pressing e:commerce tax issues, based on the substantial work performed by both business and government tax professionals over the past several years.

E:commerce is the next logical extension of the corporate business model. While the issues presented may seem unique, the requirement to resolve legal issues created by the conversion from traditional to e:commerce is at least 130 years old. In 1869, a New Hampshire court was called upon to decide the validity of telegraph communications as both writings and signatures. In its decision to validate the telegraph, the court opined, ". . . Nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office." ' As tax systems survived the telegraph, they will surely survive the Internet.

WHAT IS E:COMMERCE?

The first step toward understanding e:commerce tax issues is to understand what is meant by e:commerce. Lack of clarity in this area has fueled many lengthy tax debates that proved less relevant when transaction models are better understood. A consensus definition of e:commerce is perhaps unachievable. Instead, we offer examples of some common forms of e:commerce that we hope will be sufficient to clue readers whether or not their employers or clients are engaged in this activity. One common form of business-to-business e:commerce is Electronic Data Interchange (EDI).2

EDI is a highly secure form of computer-to-computer communication that has been the primary vehicle for e:commerce prior to the Internet. Businesses use EDI to exchange information such as purchase orders, shipping documents, invoices, and payment over point-to-point connections, private networks, or value-added networks. EDI is based on two different standards: ANSI ASC X.12 in the U.S. and EDIFACT in Europe. In the past, EDI has been limited primarily to large organizations due to the high cost of private networks, technical complexity, and operational costs. However, EDI vendors are now incorporating the new technologies and functionality developed for the Internet -- creating an "EDI over the Internet." The primary business-to-business transactions flowing through the "EDI over the Internet" will be online order processing, fulfillment, and payment for conventional products supplied offline. One emerging standard for business-to-business e:commerce is Open Buying on the Internet (OBI).

At the other end of the spectrum are the Internet storefronts selling online and offline products and services to consumers.3 The Internet will extend current retail store and mail/phone order consumer sales models. Sellers will have three primary components: (1) a storefront system (marketing materials, catalogue, ordering mechanism, customer service); (2) a back office system (accept, process and record transactions entered in the storefront); and (3) a payment gateway (validates and obtains credit card authorization and processes settlement). Buyers will need only a PC or Internet Appliance, a Web browser, and an Internet connection. Sales will be supported by several current and developing payment mechanisms. Credit cards support current e:commerce and the development of micro-payment technologies will support extending e:commerce to low-value transactions such as digital images and video clips. In addition, smart cards and payment gateway protocols (e.g., SET, C-Set, TTP payment mechanisms) are being refined to support consumer online purchases. The Internet Open Trading Protocol (IOTP) standard will support business-to-consumer transactions.

ECONOMIC SIGNIFICANCE OF E:COMMERCE

Tax authorities are concerned about the potential negative impact of e:commerce on their tax bases. Potential tax base erosion is clearly driving the pace of the governments' examination of e:commerce tax issues and will determine the urgency of the need for interim solutions. Therefore, it is important to gain some perspective on the relative percentage of economic activity expected to take place over the Internet. Many tax authorities seem most concerned about potential tax base erosion in business-to-consumer e:commerce, so it may be most important to understand the relative value of business-to-business and business-to-consumer transactions.
Business-to-business transactions, driven primarily by the potential cost savings from EDI, are expected to represent the fastest growing segment of e:commerce as well as the greatest percentage of e:commerce transaction value - but even these are still expected to represent only a small percentage of world economic value. For example, a 1999 Forrester Research study estimates total U.S. Internet sales to grow from $51 billion in 1998 to $551 billion in 2001 (7.2% of U.S. GDP). Forrester predicts that total European e:commerce revenues will represent an even lower percentage of 2001 Europe GDP - 3.6%.4 Most of these transactions are not expected to cross international borders. A 1998 WTO report predicts only $60M in international trade conducted over the Internet by 2001, or .02% of total estimated e:commerce.5

Business-to-consumer e:commerce is expected to represent an even smaller percentage of total economic activity. Forrester predicts consumer retail (online ordering for offline supply) will represent only 7% of total European Internet e:commerce revenue in 2001 (0.25% of European GDP) and only 8% of 2001 U.S. Internet e:commerce revenue (0.58% of U.S. GDP). Digital content revenue (online delivery of digital products) is expected to represent only 5% of e:commerce revenue (0.18% of GDP) in Europe and 3% (0.22% of GDP) in the U.S. in 2001.6
The Forrester and WTO data suggest that e:commerce, while growing rapidly, will remain a relatively insignificant percentage of economic activity. The

online delivery of digital products to consumers, which is expected to present the most difficult compliance challenges for tax authorities, fortunately represents only a tiny fraction of expected e:commerce revenue and is expected to grow at a slower pace than business-to-business transactions. So while tax authorities are correct to analyze e:commerce tax issues thoroughly, the amount of business is small. Tax authorities should not consider creating new rules until they have a better understanding of the e:commerce business models and technologies. The rapid pace of development in e:commerce may present administration and compliance solutions not apparent today.

WHY ALL THE FUSS?

The primary driver of the ongoing tax policy debate is tax authorities' concern that changes may be required to address the new e:commerce business and transaction models facilitated by the Internet. The OECD presented many of its initial concerns to the business community at its Turku meeting in November 1997.7 One fundamental reason for the OECD members' concern is their belief that the Internet will facilitate increased cross-border commerce and increase the mobility of business and capital. Several additional characteristics of electronic commerce appear to exacerbate the expected tax administration and compliance issues: (1) the lack of any user control as to the location of the activity (e.g., vendors don't know where their customers are, customers don't know where the vendors are, and governments don't know where either participant is); (2) no means of identifying users; (3) the reduced use of information reporting and withholding institutions (disintermediation); and (4) the development of electronic payment systems. As a result, OECD members believe that tax havens and offshore banking facilities will become more accessible and, presumably, more widely used to avoid or evade tax.

The OECD identified many issues related to tax administration and compliance, consumption taxes, income tax treaties, and transfer pricing. Several of the more significant issues relating to permanent establishments, transaction characterization, source of income, transfer pricing, withholding taxes, and consumption taxes are addressed in this article, and the authors recommend solutions. Resolving these issues would be complex in a stable economic environment. The rapidly changing transaction and business models and the rapid development of technology in e:commerce running on "Internet time" underscore the importance of focusing on general taxation principles rather than specific rules, building flexibility into the process, and continued review to ensure that e:commerce is not hindered by inappropriate tax rules designed to deal with "last year's" (or even last month's) e:commerce businesses.

BACKGROUND

Many current e:commerce tax issues have been introduced over the past several years, so a brief background review may provide helpful perspective. A comprehensive bibliography of all publications is beyond the scope of this article, so the authors have tried to select articles, papers and studies that are reasonably representative of the issues and participants. We apologize in advance for publication omissions that some

readers may consider important.

The authors have been discussing the proper taxation of computer software programs with tax authorities since the mid 1980's. In 1990, the Software Coalition submitted a ruling request to the IRS asking for clarification of the application of the U.S. withholding tax rules to cross-border payments for computer software programs and copyright rights. In 1990, the electronic distribution of software programs was already a growing part of the computer software industry's business model. The transaction characterization questions raised by this ruling request resulted in the issuance of regulations on the income tax classification of payments for the transfer of computer programs.8 The authors believe that the principles adopted in these regulations, including reliance on the economic substance of the transfer over its legal form, a careful analysis of the copyright rights transferred, and a disregard for the method of distribution, will provide important guidance for the taxation of e:commerce involving electronic transfers of digital information over the Internet.

In 1992, the OECD issued a revised Commentary to Article 12 of its Model Tax Convention proposing that revenue from software programs transferred for the "business or personal use" of the user should be considered commercial income taxable as business profits and not subject to source country withholding. Revenue from a transfer of the right to commercially exploit the software in the market should be considered royalty income subject to source country withholding. The OECD's practical analysis represented an important "next step" in the "substance over form" approach.

In late 1996, the U.S. Treasury Department (hereafter referred to as "Treasury") issued proposed regulations on the classification of transfers of computer programs.9 These proposed regulations represented another significant advance in the analysis of the proper taxation of computer software transaction revenue. The regulations classify computer program related revenue into one of four categories: (1) copyright rights; (2) copyrighted articles; (3) services; and

(4) know-how (based on an analysis of the nature of the rights transferred to the buyer). The regulations use four rights in U.S. copyright law to provide guidance on classification: (1) the right to reproduce for distribution to the public by sale, etc.; (2) the right to make derivative computer programs; (3) the right to make a public performance of the computer program; and (4) the right to publicly display the computer program. The transfer of a copyright right is classified as either a capital asset sale or a license generating royalty income depending upon the extent of the rights transferred. Copyrighted article transfers are classified as either product sales or rentals depending on which party retains the benefits and burdens of ownership. Neither the legal form of the transfer or the distribution method affect the classification determination.

Soon after issuing the computer software proposed regulations, Treasury published a discussion paper on the taxation of electronic commerce.10 Treasury identified several areas of concern for tax administrators: (1) the effective elimination of national borders; (2) inconsistent treatment

of cross-border transactions by taxing jurisdictions and taxpayers being subject to quixotic taxation; and (3) tax rules should provide certainty and prevent double taxation. The guiding principal enunciated is neutrality -- Treasury would reject the imposition of new or additional taxes on electronic transactions and would require that the U.S. tax system treat similar income equally, regardless of whether it is earned through electronic means or through existing channels of commerce. Treasury identified three major issue areas and proposed possible solutions. First, e:commerce would make it difficult to identify the country or countries that have the jurisdiction to tax such income; a shift in emphasis to residence (of the supplier) based taxation may resolve this problem. Second, classifying the income from transactions in digitized information would be more difficult - the authors would suggest that Treasury's regulations classifying computer software transactions will provide important guidance in this area. Third, administration and compliance challenges would increase because of: (1) the potential increase in anonymous and untraceable transactions; (2) the difficulty in identifying parties to communications and transactions; and (3) problems with verifying records when transactions are conducted electronically. Treasury predicted that encryption technology could help solve these administration and compliance issues by providing the means to verify the identity of persons online and ensure the veracity of electronic documents.

An OECD official discussed its interest in the taxation of e:commerce at an April 1997 Harvard International Tax Program symposium." Although the specific views expressed in the official's paper are solely the author's and do not necessarily represent the views of any of the OECD member countries, they do provide insight into some of the areas of concern. Mr. Owens recognized that the challenge for tax administrations in the 21st Century will be how to maximize the potential efficiency gains of the Internet and at the same time protect their revenue bases without hindering the development of these new technologies. At the same time, he clearly believes that the risks posed to tax systems by the Internet are real and the allocation of taxing rights must be based upon mutually agreed principles and a common understanding of how these principles should be applied. Mr. Owens also recognized the opportunities for improved tax administration created by the development of new technologies to support direct deposit programs, electronic filing, and automated deductions of social security and other payroll taxes; to streamline commercial customs processes; and to improve the exchange of information. If tax reforms are required, Mr. Owens believes that they should be evaluated using the following criteria: (I) equity; (2) simplicity; (3) certainty and predictability; (4) effectiveness; (5) avoidance of economic distortions; and (6) flexibility. Any domestic and international tax principles should be structured to ensure a fair sharing of the Internet tax base between countries. The main themes outlined by Mr. Owens, namely: (1) protection of the tax revenue base; (2) not hindering the growth of e:commerce; (3) the potential benefits to tax administrators and taxpayers from the emerging e:commerce technologies; (4) a "fair sharing" of the e:commerce tax base between countries; and (5) the need for governments and businesses to work together to resolve e:commerce tax issues, will be repeated time and time again at the future OECD meetings on e:commerce taxation and remain at the heart of the discussions.

The Australian Tax Office (ATO) made a significant contribution to the discussion of the taxation of e:commerce with the publication of its 126 page report on Internet taxation.'2 The purpose of the report was to examine the electronic commerce environment and to make recommendations about how Australia's existing taxes could be properly administered in this new environment. The ATO estimated the potential impact of e:commerce on Australia's tax base by examining several industries selected by reference to the most frequently purchased goods and services over the Internet: (1) computer software and hardware; (2) travel arrangements; (3) books and magazines; (4) music tapes and CD albums; and (5) gambling. Consistent with the Forrester and WTO e:commerce economic impact estimates previously discussed, the ATO report found that electronic commerce is still in its infancy and does not present a severe risk to the Australian tax revenue base. Consistent with the U.S. Treasury and Mr. Owens of the OECD, the ATO report identifies the major tax concerns as jurisdiction, identification, information, and collection mechanisms. The more notable findings of the report include: (1) many digital products can be expected to fall within the current broad definition of royalties (subject to withholding tax); (2) the possible use of e:commerce middlemen (e.g., Internet Service Providers (ISPs) and Online Service Providers (OSPs)) as tax reporting and collection agents; (3) e:commerce could lead to increased difficulty in applying traditional (transfer pricing) transactions methods and result in a greater use of profit split and profit comparison methods; (4) it would be feasible to develop code, embedded in popular websites such as Netscape Navigator or Microsoft Explorer, to enable reporting of financial transactions; and (5) while some revenue loss can be addressed by changes to the existing income tax law, in most cases the key concepts are so inappropriate that they will be unable to maintain the current level of revenue.

The ATO report concluded with numerous recommendations, including the following: (1) the overriding principle is that there should be broad neutrality between the treatment of businesses engaged in traditional physical commerce and those engaged in electronic commerce; (2) tax return forms should be amended to require businesses trading on the Internet to provide contact information such as the uniform resource locators (URLs) and email addresses together with limited information indicating Internet trading; (3) webshops should be licensed; (4) ATO should negotiate with providers of software used for electronic transactions to incorporate message digests, electronic date stamp or other available technology to ensure the integrity of transactional records; and (5) the ATO should negotiate with major international credit card and electronic payment system providers to seek international agreement to allow revenue authorities to obtain access to credit card transaction details held by credit card companies outside of the jurisdiction of the domestic revenue authority. The ATO report broke new ground with respect to the specificity of its proposals to facilitate increased ATO scrutiny of e:commerce transactions and to require foreign credit card companies to report e:commerce transaction details to the ATO. ATO's recommendation that webshops should be licensed, reflecting their current standard practice of registration of businesses, suggests that ATO consider webshops to constitute permanent establishments. The authors disagree with this position.

The OECD convened its first informal discussion of e:commerce tax issues with the business community in Turku, Finland in November 1997. The tax issues raised at this meeting were based in large part on Mr. Owens' paper delivered at the Harvard International Tax Symposium and are described in detail in the "Why all the fuss?" section of this article.'3 Several preliminary conclusions were reported out of the Turku meeting: (1) the OECD is the proper forum to consider these issues; (2) the primary area of concern is in the area of online transactions of digital products, content, and services with individual consumers; (3) permanent establishment issues require further analysis; (4) the Internet may enable a much wider group of taxpayers to engage in tax evasion by reducing the costs and inconvenience of remote commerce; (5) the point of consumption should be the basis for VAT taxation; (6) neutrality between electronic and non-electronic transactions should be maintained; (7) tax administrators must have equal access to secure information in the online and offline worlds; (8) it is not always clear what a relevant comparison is for purposes of measuring neutrality; and (9) greater levels of cross-border mutual assistance among tax authorities is needed for enforcement. The OECD invited the business community to work directly with the various OECD working groups and identified consumption tax issues as the most urgent to resolve. The preliminary conclusions of the Turku meeting would provide direction and agendas for the OECD's e:commerce meetings with business until the next OECD ministerial meeting in Ottawa.

Because consumption tax issues were identified as the top priority by the participants at the OECD's Turku meeting, the first post-Turku OECD meeting with business was convened on consumption taxes in Ottawa in April 1998.14 To prepare for the meeting, the responsible OECD working group reviewed 19 indirect tax systems for the impact of electronic commerce on taxation and compliance. They concluded that non-taxation and double taxation occurred in several situations: (1) mail order goods (no taxation); and (2) services and digital information (non- and double taxation). The OECD working group's proposed solution, tax at place of consumption, would require a change in both the current VAT place of supply rules and in the VAT definition of goods and services. For example, several OECD member participants suggested that all online deliveries of digital products should be classified as services for VAT. The OECD participants generally agreed that the primary consumption tax collection problem created by e:commerce is limited to transactions involving a taxable supply where delivery takes place online, the customer is not registered for tax (or is exempt), and the customer is in a different tax jurisdiction than the seller.

The next OECD/business meeting addressed tax administration issues.'5 The OECD presented a draft discussion paper 16 raising questions for further consideration, including: (1) can the Internet Protocol (IP) number, domain name, or Internet service provider (ISP) client registration procedures or other means such as digital certificates be used to identify businesses and their locations reliably for tax purposes; (2) is it reasonable and practical to expect that cash-like payment systems will introduce audit trails and proper user identification arrangements for commercial transactions; (3) how might relevant transactional information be created

at the individual level, particularly in cross border business to individual transactions; (4) what technologies (e.g., message digests and digital notarization) could be used to ensure the reliability of electronic records; and (5) what role can the private sector play in assisting in the collection of tax due on electronic commerce. OECD members remain concerned about administration and compliance issues and look to the business community to help provide an automated tax assessment, collection and reporting mechanism for e:commerce transactions. The OECD's next meeting, held in Washington, D.C. on May 14, 1998," dealt primarily with permanent establishment and tax treaty issues '8 discussed at length in the following sections of this article. On June 10, the OECD met with representatives of the financial industry to discuss the development of electronic payments systems.'9 The agenda included the following topics: (1) the technical aspects of electronic payment systems; (2) the role of the financial service sector as a third party in electronic commerce; and (3) the impact of electronic commerce and related electronic payment systems on the administration of consumption tax and income tax systems. The agenda and discussion at this meeting indicate that OECD members remain hopeful that financial institutions and electronic payment system providers will be able to assist governments in the areas of transaction reporting, tax assessment, and collection. While the OECD was engaged in its series of informal meetings with business another OECD member, Canada, issued a significant report 20 : on the potential impact of e:commerce on Canada's tax administration. Although this is an advisory report that does not represent the official position of Revenue Canada, it does illustrate the continuing struggle to find the proper balance between encouraging the growth of e:commerce and protecting the tax revenue base. The report concludes that countries and businesses have much more to gain by stimulating electronic commerce than by inhibiting it and recommends that Canada should foster a favorable business and regulatory environment to attain a leadership position in the new world of cyberspace -- resulting in an expanded tax base.

The report concludes with numerous recommendations, including the following: (1) the private sector should lead in the management, promotion, and development of electronic commerce; (2) the aim of government involvement should be to support and enforce a predictable, consistent, and simple legal environment for electronic commerce; (3) the overall electronic commerce environment and specific business practices need to be understood before any new policies or taxes are introduced; (4) the taxation of electronic commerce should be economically neutral as well as equitable -- functionally equivalent transactions should be treated the same, regardless of their form; (5) taxes should be easy to administer and collect; and (6) the tax system should not give rise to multiple taxation and should provide for a fair allocation of tax base and revenues among jurisdictions. The report contains many positive statements against government intervention in e:commerce, but the continuing theme among OECD members for a fair allocation of the tax base and revenues among jurisdictions should concern e:commerce businesses.

Shortly before the OECD's Ottawa ministerial conference on e:commerce, the U.S. Treasury issued final regulations on the tax classification of transfers of computer programs.2' The final regulations retain

substantially all of the provisions in the 1996 proposed regulations, while adding additional explanations and clarifications requested by taxpayers.22 The changes include: (1) more specific guidance on title-passage; (2) additional guidance on the application of U.S. and foreign copyright law; (3) guidance with respect to the application of the Regs. 11.861-18(b)(2) de minimis rule; (4) clarification of the term "distribution to the public"; (5) clarification that the distribution mechanism and the payment term are irrelevant for purposes of classifying the transaction; and (6) providing for an automatic accounting method change to comply with the regulations.
The day preceding the OECD's ministerial conference on e:commerce, "A Borderless World: Realizing the Potential of Global Electronic Commerce," the OECD's Committee on Fiscal Affairs held a one day meeting with business 23 to review the results of the post-Turku meetings and to discuss proposals for future work. The OECD used the meeting as an opportunity to release a revised Commentary on Article 12 on the proper tax classification of revenue from computer software transactions.2 The revised Commentary is more consistent with the U.S. Treasury regulations in important ways: (1) software classification is based on the distinction between transactions in copyrighted articles and transactions in copyright rights; and (2) recognition of the special circumstances of computer programs by characterizing the transfer of the right to copy as a transfer of a copyright right only if the right to copy is accompanied by the right to commercially exploit the software by distribution to the public. In addition, the Commentary clarifies that revenue from software site and enterprise licenses should be treated as business profits and that payments for the acquisition of partial rights in a copyright should be characterized as royalties whereas payments for program copies should be treated as commercial income (not subject to withholding). The OECD's decision to release the revised Commentary at this e:commerce meeting suggests that the OECD may share the authors' view that the principles supporting the tax classification of computer software transactions may provide helpful guidance for the tax classification of e:commerce transactions.

The OECD also issued its proposed "framework conditions" document 25 that the Committee of Fiscal Affairs submitted to the member country Ministers the next day for their approval. The "framework conditions" identify the general tax principles that should be applied to e:commerce and identify the principal areas for further work. Many of the concepts in the document have been previously discussed but a brief review is appropriate because this "framework conditions" document will guide OECD work on the taxation of e:commerce for the next several years. The following widely accepted general tax principles should apply to the taxation of electronic commerce: (1) neutrality; (2) efficiency; (3) certainty and simplicity; (4) effectiveness and fairness; and (5) flexibility. Four major areas were identified for further work: (1) improving taxpayer service; (2) tax administration; (3) consumption taxes; and (4) international taxation norms.

The work on improving taxpayer service will focus on proposals such as (1) developing Internet web sites offering up to date information and providing taxpayer guidance; (2) offering/requiring single e-mail access points for

highly mobile taxpayers; (3) increasing the use of e-mail to receive and respond to taxpayer service inquiries by e-mail; (4) increasing acceptance of tax return data and other information by the use of new technologies; and (5) working with other arms of government to investigate the benefits of single government registration points on the Internet. The tax administration work will address issues such as: (1) requiring that businesses engaged in electronic commerce identify themselves to Revenue authorities in a manner that is comparable to the prevailing requirements for businesses engaged in conventional commerce in a country; and (2) mechanisms facilitating tracing, for tax purposes, of inadequately identified web sites and other electronic places of business. The consumption tax work will include the following topics: (1) the revenue authorities' conclusion that rules for the consumption taxation of cross-border trade should result in taxation in the jurisdiction where the consumption takes place and the need to reach an international consensus on the circumstances under which supplies are held to be consumed in a jurisdiction; (2) the conclusion reached by revenue authorities that for the purpose of consumption taxes, the supply of digitized products should not be treated as the supply of goods; and (3) examine the use of reverse charge, self-assessment or other equivalent mechanisms where this would give immediate protection of their revenue base and of the competitiveness of domestic suppliers with respect to the acquisition of services and intangible property from suppliers outside the country.
Finally, the work on international taxation norms will include: (I) clarification, in the Commentary on the Model Tax Convention, as to how the current definition of permanent establishment applies where electronic commerce transactions are concluded through a web site on a server located in a country; (2) the characterization of various types of electronic commerce payments under tax conventions with a view to providing necessary clarification in the Commentary to the OECD Model Tax Convention; (3) monitoring developments in electronic commerce to see whether additional guidance on the application of the OECD transfer pricing guidelines is necessary; (4) consideration of developing an Article for inclusion in the OECD Model Tax Convention to allow for assistance by one State in the collection of tax for another State; and (5) considering how harmful tax competition for electronic commerce is to be avoided, in the context of the recommendations on geographically mobile activities accompanying the OECD Report "Harmful Tax Competition."

The issues identified above will be addressed by the OECD over the next several years, and the business community will be permitted to participate in this process through technical advisory groups (TAGs) that will also include representatives of OECD member countries and non-OECD countries. This work will result in decisions on OECD taxation principles for e:commerce, and the authors recommend that the business community actively participate in the TAGs to help guide the OECD toward reasonable solutions. Although the TAGs have not been finalized, the authors believe that five TAGs may be formed in the areas of: (1) income characterization; (2) permanent establishment/income attribution; (3) consumption tax; (4) tax administration; and (5) authentication/digitized records. The TAGs are expected to complete their work over the next two to three years.

No background on the taxation of e:commerce would be complete without at

least a brief mention of the debate over the U.S. state and local taxation of e:commerce. Both Treasury and the OECD are monitoring the issues raised in this debate, and any solutions proposed and adopted could provide some guidance for international tax policymakers.26 The National Tax Association (NTA) Communications and Electronic Commerce Tax Project (the "Project") held its first official meeting held in September 1997. Participants in the Project include representatives of the United States, state and local governments, business, and academia. The Project has focused on the application of consumption taxes to electronic and other forms of remote commerce. The Project's participants have unanimously approved consideration of a one-rate-per-state sales tax formula. Government support for the "one rate" proposal is expected to be predicated on the business community's acceptance of an expanded duty to collect sales and use tax. The Project's participants are discussing other issues, including: (1) expansion of the project scope to include income taxes and nexus; and (2) whether any agreement on expanded duty to collect must include an agreement on minimum physical presence required for income tax nexus.

In October 1998, President Clinton signed the Internet Tax Freedom Act (ITFA) into law.27 The ITFA imposes a moratorium beginning on October 1, 1998, and ending three years after the date of enactment on: (1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and (2) multiple or discriminatory taxes on electronic commerce. The ITFA also establishes an Advisory Commission on Electronic Commerce to study issues related to the international, national, and sub-national taxation of remote commerce and to make recommendations to Congress. The Commission consists of 19 members representing the United States, state and local governments, the electronic commerce industry, telecommunications carriers, local retail businesses, and consumer groups. The Commission's report is due 18 months after the date of enactment, at which time the Commission will terminate. The statute requires that all Commission recommendations shall be tax and technology neutral and shall apply to all forms of remote commerce. The ITFA's statutory language suggests several topics for the Commission to study, including: (1) an examination of the collection and administration of consumption taxes on electronic commerce in other countries and the United States, and the impact of such collection on the global economy, including an examination of the relationship between the collection and administration of such taxes when the transaction uses the Internet and when it does not; (2) an examination of the impact of the Internet and Internet access on the revenue base for telecommunications excise taxes; (3) an examination of model state legislation that would provide uniform definitions of transactions subject to or exempt from sales and use taxes and would ensure that Internet access, online services, and transactions using the Internet, Internet access or online service would be treated in a tax and technology neutral manner relative to other forms of remote sales; and (4) an examination of the effects of taxation, including the absence of taxation, on all interstate sales transactions, on retail businesses and on state and local governments to collect sales and use taxes owed on in-state purchases from out-of-state sellers.

PERMANENT ESTABLISHMENT General Principles The notion of a "permanent establishment," as embodied in tax treaties, is a crucial one. Where the

concept is applicable, one treaty partner relinquishes its jurisdiction to tax the business profits of residents of the other treaty partner unless local activities rise to a certain threshold, i.e., unless they amount to a permanent establishment. Thus, the purpose of the permanent establishment concept is to define when a nonresident has established sufficient presence in a jurisdiction so as to warrant direct taxation of his business profits there. When a taxpayer's presence is not sufficient (i.e., when no permanent establishment exists), source-based taxation is ceded in favor of residence-based taxation.

Application of the permanent establishment concept to particular circumstances, including e:commerce transactions, is important to taxing authorities because it determines how taxing power will be allocated among various jurisdictions that may lay claim to the income generated by enterprises that operate in multiple countries. Therefore, it affects the revenue base of, and ultimately the tax revenue collectible by, each jurisdiction. Uniform rules of application are important to taxpayers who need common interpretations among various jurisdictions in order to avoid double taxation. Clear and consistent application of the permanent establishment rules is, of course, important both to taxpayers and to taxing authorities in order to provide certainty and to simplify tax administration. A permanent establishment is generally defined as a "fixed place of business," including an office, a branch, a factory, or a similar physical location.zs Most treaties, however, explicitly exempt certain activities from the definition of permanent establishment, even if those activities are carried on through such a "fixed place of business." For example, storage of merchandise, delivery of merchandise, and maintenance of a fixed place of business in order to collect information, supply information, or advertise are generally labeled "preparatory or auxiliary" activities, and do not give rise to a permanent establishment pursuant to most treaties. Treaties usually also have provisions explaining the circumstances under which the activities of an agent will give rise to a permanent establishment of the principal. Generally, a non-resident will not have a permanent establishment as a result of the activities of an agent unless the agent is a dependent agent with authority to conclude contracts in the name of the non-resident principal.

Thus, traditional treaty definitions consider both the nature of the activities carried on by an enterprise (or its agents) and the physical character of the operations.

Traditional Permanent Establishment Rules Are Flexible and Can Be Applied to E:commerce Transactions The permanent establishment rules historically have been based on the existence or absence of a physical presence such as a building, equipment, or persons. The fact that the distinguishing characteristic of e:commerce is its electronic, non-physical element, has led some commentators to suggest that the historic permanent establishment rules cannot be applied in the e:commerce context. This contention is based on an inaccurate perception about e:commerce. The development of e:commerce may make it easier for businesses to reach customers in foreign jurisdictions without establishing a physical presence in that jurisdiction. Nevertheless, all e:commerce business, like any other business, requires traditional inputs of buildings, equipment, and human

participation. Even where customer transactions are ultimately carried out electronically, businesses still require a capital and labor infrastructure in order to develop, produce, and promote their products and services and in order to operate their affairs. The relative mix of inputs may be somewhat different, as in the e:commerce economy intellectual capital may be relatively more important than tangible capital. The e:commerce economy also includes a greater proportion of products that are nonphysical, such as electronically distributed music, software and video. None of these differences, however, means that an e:commerce company has no physical presence anywhere. It is true that e:commerce provides an additional avenue of communication with customers that expands opportunities for businesses to penetrate foreign markets without establishing physical connections in those markets. Thus, the application of traditional permanent establishment concepts to e:commerce transactions may lead to an increase in residencebased taxation rather than source-based taxation. The important question to consider, therefore, is one of policy: should multinational enterprises be permitted to do business across longer distances than they have been able to in the past without triggering direct taxation by the jurisdiction in which the customer is located? If the answer to this question is yes, then application of the traditional permanent establishment rules to e:commerce transactions is fairly straightforward.

We believe that the basic principles underlying the permanent establishment concept remain sound for the e:commerce economy and should not be abandoned. For a long time it has been possible for an enterprise to sell to customers in another country without having a physical presence there. Long before the rise of e:commerce, a business could make contact with customers via television, mail order, or telephone. The permanent establishment rules have not been modified in response to the growth over time of these "traditional" modes of communication. The justifications for our view that the recent growth of this newest mode of communication also should not require a modification of the permanent establishment rules are based on the points that (i) neutrality is an important goal; (ii) there is no better alternative that could be accepted internationally; and (iii) any potential "imbalance" of e:commerce trade does not require a new and different tax system.

The international tax system should attempt to achieve neutrality, i.e., to ensure that business carried on electronically will be subject to the same rules and rates of taxation as business carried on through more conventional means. Maintaining neutral principles of taxation between e:commerce and other business channels will emphasize principles of substance over form, and will reduce the likelihood that tax rules will interfere with decisions regarding which means of transacting business is most effective from an economic and commercial perspective. Presumably no one would propose abandoning the permanent establishment concept altogether, but creating a new and different set of rules solely for enterprises engaged in e:commerce merely emphasizes the non-neutral nature of the proposal.

The fact that no tax liability is created in the customer state does not mean that the e:commerce enterprise avoids full tax in those places where its physical inputs are deployed. Transfer pricing rules will remain

available to allocate income among those jurisdictions where capital and labor in fact are employed to create wealth. A direct tax obligation arising in the country of source when the enterprise has no physical presence there would create a disproportionate tax burden in terms of both compliance costs and amount of tax paid compared to the enterprise's connection to the local economy. Applying the traditional rules, rather than developing new rules, will also facilitate uniformity and consensus among countries regarding the taxation of e:commerce. The prevailing concept of permanent establishment is well established in the treaty context, and similar rules appear in the domestic laws of most countries. Rules of application of the concept are fairly well understood and accepted. No better alternative is apparent. Any proposal to substitute a withholding obligation in place of net basis taxation would disconnect the amount of tax from the actual profit earned on the transaction, while creating a disproportionate compliance burden for e:commerce enterprises. The use of established rules as a starting point to determine the taxability of e:commerce transactions is preferable to the institution of a new and untried system.

Probably the most serious policy argument that needs to be addressed in the international context is the suggestion that new permanent establishment rules are needed for e:commerce because countries that are primarily importers rather than exporters of goods and services provided over the Internet (or via other electronic means) will not be inclined to accept the resulting allocation of taxable income under existing rules. As noted above, it is true that source-based taxation may cede ground to residence-based taxation for many e:commerce transactions (as compared to their traditional counterparts), so that a country that is a net e:commerce consumer rather than supplier would tend to have a smaller proportion of its overall tax base contributed by e:commerce enterprises. The suggestion that the rules should be modified to assuage fears of net e:commerce-importing countries is shortsighted, however, for several reasons. First, the justification for allowing the source country to tax e:commerce transactions is based on the notion that the provision of a customer base is a benefit provided by the jurisdiction to the seller, and that this benefit justifies the imposition of tax. The current international consensus on the taxation of business profits, however, allocates taxable income to the places where value is created through inputs. Allocating tax authority, instead, to the place where customers reside would permit jurisdictions where no value is added to enjoy a share of the pie. The OECD and more developed country tax authorities traditionally have argued that this sort of protectionism is inappropriate from a policy perspective. Accordingly, the primary objective of the international community in the e:commerce context should be to dissuade countries from taking protectionist positions, not to accede to their views.

A variant of the protectionist argument is that net importers will see a serious erosion of their overall tax base. This would only happen, however, if e:commerce transactions originating offshore were to displace local enterprise. Yet many e:commerce businesses represent incremental economic activity. We are not aware of any analysis demonstrating that the value added to the global economy by the rise of information access businesses,

for example, has been matched by the disappearance of value added through the demise of some other sector of a local economy. If, on balance, e:commerce is increasing, rather than redistributing, global wealth, there is no justification (other than a protectionist one) for a country of source to demand a fixed percentage of global wealth if the increment is not being created locally. In any event, the absolute economic significance of trade imbalances in the world of e:commerce is modest at best. As discussed in Part I of this article, although e:commerce is clearly of growing significance, it will still represent only a small fraction of U.S. and global gross domestic product, and only a small fraction of that represents cross-border transactions.

As e:commerce grows in overall importance to the world economy, the balance of trade between those countries that are currently net importers and net exporters of e:commerce will change. The United States today is a net exporter of electronic commerce. If the U.S. economy continues to be a fertile ground for innovation, it may remain so for many years. We suspect, however, that the absolute magnitude of the U.S. trade surplus in this sector will decrease over time, and that countries that are now net importers of e:commerce may become net exporters. In any event, to the extent that trade imbalances in e:commerce remain, the result is merely parallel to the world of conventional commerce. Trade imbalances have existed for years in important sectors such as consumer electronics, oil, automobiles and any number of other industries without the international community deciding to tamper with income tax rules in order to address these imbalances.

In sum, fundamental changes to the rules allocating taxing jurisdiction among countries should be undertaken only to reflect reasoned policy decisions. Moreover, such changes should be made only as they become necessary and only as it becomes clear what corrections are likely to resolve actual problems that arise in the e:commerce context. Modifications to the system should not be made in anticipation of perceived problems that are not yet significant and that may, in any event, be temporary. The Existence of Mere Servers or Websites in a Jurisdiction Should Not Give Rise to a Permanent Establishment in that Jurisdiction Once the policy decision has been made to continue to allow multinational e:commerce to develop without undue interference from the tax system, the next step is to determine how to apply traditional permanent establishment principles to e:commerce transactions. Application of the ordinary, physical-presence rules should not be difficult once it is recognized that businesses that utilize e:commerce to conclude customer transactions nevertheless employ traditional labor and capital inputs in order to create value. The traditional tests look to the geographic location of the labor and capital that lead to the creation of income. There is no need for any different focus in the e:commerce context.

Mere visibility from a jurisdiction via a website should not give rise to tax nexus. Under traditional principles, a taxpayer generally does not have a permanent establishment in a given jurisdiction unless it has a substantial permanent physical presence or a dependent agent with contract concluding authority in that jurisdiction. The mere fact that an entrepreneur penetrates a market through electronic advertising,

solicitation, and contracting should not provide taxing authority to the market jurisdiction. Nor should the mere presence of customers in a particular jurisdiction give rise to a taxable presence there. These concepts are not novel. On the contrary, it is well settled that arrangements to contact customers via remote telecommunications (e.g., telephone, television, mail), even if supported by local advertising, do not give rise to taxable nexus, and there is no reason that the use of the Internet (or similar electronic communications) should alter this analysis. The advent of e:commerce has not changed the fundamental legal and commercial relationships between producers and consumers of goods and services. Thus, access to a website from a particular jurisdiction should not create a permanent establishment for the business that owns and maintains the site. Moreover, the mere presence of a server that hosts a website in a particular jurisdiction, without more, should not create a permanent establishment. Although the Commentary to the OECD Model Treaty notes that "in certain instances, machinery or equipment" can constitute a "place of business," 29 that place of business will not create a permanent establishment unless it is "fixed" and unless business is "carried on" through that fixed place. Servers are not the type of equipment through which business is "carried on," any more than telephone equipment constitutes equipment through which the subscriber's business is carried on. Mere ownership of this equipment, without the presence of people, simply does not constitute the "operation" of a business.' Moreover, the functions that are performed through servers are typically similar to functions that are deemed "preparatory and auxiliary" in the traditional context, such as advertising, delivery, and supply of information. It is therefore more consistent with current law to focus on the location and activities of the employees and other dependent agents of a business rather than its communications equipment.

In this regard, it is worth considering the German Supreme Tax Court decision regarding taxation of profits from an unmanned oil pipeline, decided on October 30, 1996. In that case, a German court determined that Germany had jurisdiction to tax the income of a Dutch oil company that was derived from a pipeline located in Germany, even though the operations of the pipeline were controlled entirely from the taxpayer's headquarters in the Netherlands. Some commentators have suggested that the court's analysis in the German pipeline case, if generally applicable to determinations of permanent establishment, would indicate that the mere presence of a server should create tax nexus, even without local activity by employees or dependent agents with contract concluding authority. The authors disagree with that result.

Even if the principles behind the German pipeline case were applicable to the analysis of permanent establishment in the e:commerce context, it does not follow from that case that the mere presence of a server provides an adequate basis for taxation. On the contrary, the German tax court relied in its decision on the fact that the taxpayer's business was the transport of oil, and that the pipeline was integral to, and in fact the "most important part of," that business. A server, by comparison, is generally incidental to the underlying business of an enterprise, similar to telephone equipment, mail order catalogs, or a delivery truck. Furthermore, the German tax court focused on the fact that an oil pipeline possesses a

certain degree of permanence, and that that permanence is evidenced by the fact that the pipeline is physically linked to the surface of the earth. In contrast, a server is inherently impermanent and can be relocated with relatively little difficulty.
In any event, any permanent establishment rule that focuses on the location of a server or website alone will lead to complications in application as well as manipulation by taxpayers. For example, a server might be located in a tax haven, or it might be moved from location to location periodically. Alternatively, a number of parallel sites on different servers located in differing countries might be used, with customers directed to different servers depending on the amount of traffic. Or a business might not own a server at all, but might instead rent capacity on a server owned by a separate enterprise. Thus, focusing on the location of a server or website would lead to illogical results in some circumstances and would seem, in any event, to give unwarranted income taxing authority to a jurisdiction where, as an economic matter, no wealth is actually created.

The traditional physical presence test looks to where value and wealth are created by reference to capital, equipment and human activity. This test can and should be applied in the conventional context and in the e:commerce context in an analogous manner. Permanent Establishment Rules Should Be Permitted to Develop Independently from VAT Rules and U.S. State Tax Rules
It is worth noting the similarities between permanent establishment issues and the definitions of place of supply (for purposes of the value added tax ("VAT") imposed in many European countries) and nexus (for purposes of U.S. state sales and use and income taxes). These similarities, however, do not require that the permanent establishment rules develop in parallel with either the VAT rules or the U.S. state tax rules. On the contrary, because the system of international income tax has different underpinnings than the VAT system or the U.S. state income tax system, requiring that permanent establishment rules develop in tandem with place of supply rules or nexus rules might undermine the goal of maintaining neutrality in the international income tax arena between taxation of e:commerce and taxation of more traditional business transactions.

VAT is a tax on the value added to goods and services. Imposition of VAT is dependent upon the place of supply of goods or services. With the development of e:commerce, suppliers of services have less need to be located at the same place as the consumers of those services. Thus, the concept of place of supply, particularly for services, becomes less determinate. The OECD has proposed that certain services provided by e:commerce will be regarded as supplied at the location of the consumer." There is no reason that the permanent establishment rules for e:commerce should be consistent with VAT rules. The purpose of the permanent establishment rules, i.e., to set a threshold of business activity that will provide authority to impose direct tax, is distinctly different from the purpose of the place of supply rules, which are designed to provide administrable reference points for determining the value of goods and services for a tax that focuses on where consumption takes place rather than where income is generated. The VAT rules do not rely on any nexus rules to trigger tax liabilities. Thus, the two systems should be permitted to develop independently.

Principles of taxation in the U.S. states contain concepts that are somewhat similar to permanent establishment principles. In order to satisfy the requirements of the U.S. Constitution, a state may only impose a tax on a taxpayer that has substantial nexus to that state. The substantial nexus test requires some level of physical presence in a jurisdiction for sales and use tax purposes and possibly for income taxes as well.2 Despite the superficial similarities between permanent establishment and state tax nexus, these bodies of law should develop separately from one another. The international income tax system and the U.S. state income tax system have historically been based on different theories and exist in entirely different political contexts. Permanent establishment rules are the result of many years of international negotiations. In contrast, nexus for U.S. state tax purposes is a creature of U.S. state tax policy and U.S. Constitutional law. Although it is not entirely clear, it seems that the level of physical activity that can create state tax nexus is less than the presence required to establish a permanent establishment.33 The fact that the barrier for direct taxation is higher in the international arena than among states within the same nation seems appropriate, as legal, political, and economic relations are more integrated within a single sovereign nation than they are with its foreign trading partners. In addition, allocation of the income tax base in the international arena is based on the arm's length standard, whereas allocation among states is based on apportionment formulas. Thus, there is no reason to require that the development of the principles of permanent establishment in the e:commerce context mirror the development of the U.S. state tax nexus rules.

TRANSACTION CHARACTERIZATION General Principles Determining the character of a transaction is a critical first step in analyzing its tax consequences. Whether a transaction gives rise to income from sale of goods, income from the provision of services, royalty income, or some other category of income may have a number of consequences. For example, different source rules may apply to different types of income. In addition, characterization of a transaction may affect the selection of the proper transfer pricing method, the application of withholding rules, the application of treaty provisions, etc.

The income that is generated by an e:commerce transaction must be classified into one of several categories. The list of possible categories varies, to some extent, with the particular tax consequence being considered. For example, most treaties contain specific provisions for business income, interest, dividends, royalties, income from immovable property, income from the activities of artists and sportsmen, income from personal services, profits from the operation of ships or aircraft in international traffic, etc. Many also contain provisions for "other income" to be utilized where a particular type of income is not specifically provided for elsewhere in the treaty." The Internal Revenue Code provides specific source rules for interest, dividends, income from personal services, income from the sale of personal property, rentals and royalties, income from sale or exchange of inventory property, social security benefits, certain transportation income, international communications income, etc.35 The subpart F regime contains separate rules for personal holding company income, sales income, services income, shipping income, and

oil related income.36

These lists of categories have some important similarities. For example, the U.S. source rules, the U.S. subpart F regime, and typical treaty provisions all have particular rules for services income. There are also many differences among the lists of possible income categories, however. For example, treaties have an "other income" category. In contrast, there is no explicit "other income" category for U.S. sourcing or subpart F rules.3' In any event, as the focus of this article is on general international principles, we are most concerned with categorization of income in the treaty context. Nevertheless, because there are more U.S. authorities that discuss characterization issues in the domestic law context than in the treaty context, we rely in large part on a discussion of U.S. domestic law principles. Since domestic law interpretations generally are used where the treaty does not provide its own definition of a term, the concepts discussed below should be useful outside the sphere of domestic law.

To the Extent Possible, E:commerce Transactions Should Be Characterized in Accordance with the Same Principles as Conventional Transactions There have always been some items of income that have been difficult to characterize for tax purposes. For example, in Boulez v. Comr.,38 the U.S. Tax Court was called upon to determine whether income received by a taxpayer who contracted to produce recordings for CBS Records was income from the performance of services or whether it constituted royalty income for purposes of the application of certain treaty provisions.39 Relying on the intention of the parties to create a services relationship and on the fact that the taxpayer never held a property right in the intangibles created, the Court determined that the income was services income.' Similarly, in Guy F. Atkinson Co. of California and Subsidiaries v. Comr.,4' the Tax Court was called upon to determine whether a taxpayer's income earned from constructing a dam was income from services or from the sale of goods.2 Another example of income that might be difficult to classify would be income from a coin-operated laundry machine. Should this income be treated as rent for the use of the machine, payment for the service of providing the laundering facilities, or some other type of income?

Although the existence of difficult characterization issues is not new, new forms of value created by e:commerce enterprises will likely blur the lines among categories of income in new ways. Thus, for example, income from the sale of a conventional bound set of encyclopedia volumes should clearly be characterized as income from the sale of goods. Income from the provision of access to an on-line database including the same information contained in a conventional encyclopedia, however, may appear more like income from the rendition of services, particularly if the information is updated often or if the database allows the user to search and organize the data according to his needs.

There are many e:commerce transactions that should not give rise to difficult characterization issues. For example, the sale of tangible property that has been ordered electronically should not give rise to income characterized any differently than income from the sale of tangible property that is ordered by mail or telephone. Similarly, the electronic

transmission of digitized information (e.g., software programs, text, sound, video images) should be characterized so as to maintain neutrality between these transactions and transactions involving traditional media containing similar information (e.g., computer program CDs, books, music CDs, or video tapes). In this regard, the regulations concerning classification of transactions involving computer programs, though by their terms applicable only to computer software, embody principles that are useful for classifying transactions in digitized information generally." In addition, the OECD Commentary to Article 12 of the OECD Model Tax Convention provides guidance on the distinction between royalty income and other categories of income in the software context that is equally appropriate for e:commerce transactions generally. Sales of Goods vs. Services

Assuming that the distinction between royalty income and other income will be determined by substance over form principles similar to those expressed in the U.S. software classification regulations and the OECD commentary to the royalties article of its model treaty, it seems likely that the most difficult characterization issues that are likely to arise in the e:commerce context involve the distinction between transactions in goods (both sales and rentals) and transactions in services.' Such is the case in the example mentioned above regarding the "sale" of an on-line encyclopedia. Similarly, the electronic provision of a newspaper on a daily basis could be characterized as a sale of goods or as the provision of a service. Fees paid for a one-time use of music or video images or for the one-time use of a software application might arguably be characterized as rental income or services income.

There are some circumstances in the treaty context where the distinction between transactions in goods and transactions in services may be of little practical significance. At least in those treaties that classify rentals as business profits, a classification as either sales of goods, rental of property, or services would simply give rise to "business profits." Nevertheless, the distinction between goods and services is important under the domestic laws of many jurisdictions for many purposes, and is therefore worth considering. Furthermore, in the treaty context, many treaties classify rents along with royalties as subject to withholding if the property is used in the source country. The treaty rental terms also generally refer to rents of "tangible property," so a further interpretative question exists when the item delivered is not physical.

The basic distinction between a transaction in goods versus a transaction in services is whether the customer acquires property from the provider. Implicit in the concept of services income is the notion that the value that is conferred upon the purchaser does not take the form of a cognizable property interest. Therefore, generally speaking, if the seller transfers possession of property rights to the purchaser, the transaction should be characterized as a transfer of property (either sale or rent) rather than the provision of a service. On the other hand, if the customer does not receive an interest in property, then the revenue should be characterized as revenue from services. In this regard, the term "property" should be understood to include electronic data, including software, digitized music or video images, and other forms of digital information and content.

In keeping with the principles of Boulez, Ingram and Karrer, discussed above, however, in those instances in which property is created in connection with the rendering of services, the transaction should nevertheless be treated as giving rise to services income if the property rights that are conferred upon the purchaser never belonged to the provider. Similarly, where, as in Atkinson, property that is provided to the customer is only ancillary to services rendered, the transaction should nevertheless be characterized as one in services.45

In data delivery transactions, a customer typically interacts with a computer server that has been programmed to provide customers with software, information, or other digital content. In these transactions, customers receive information either in response to a query or under some sort of subscription. The various transactions in this category differ from one another principally in the manner in which the information is selected. The request is initiated in each instance by the customer, and the customer is responsible for specifying the criteria for selecting information. The computer server and the software that responds to the inquiry are essentially delivery vehicles. The real value to the customer in the transaction is in the digital content that he receives, not in the delivery mechanism, much like the value in a magazine, book, or video is in the content of the item itself. In order to maintain neutrality between these electronic transactions and parallel conventional transactions, these transactions should typically be treated as sales of goods. In contrast, there are some electronic transactions in which the data retrieval mechanism is of great value to the customer, while the raw data is of little or no value on its own. Such would be the case, for example, where users are able to search and organize vast quantities of data that is available in the public domain, but that might be difficult or impossible to obtain in an efficient manner without database capabilities. Any information that the customer retrieves will be a unique package of information that has been custom assembled for that particular customer in accordance with his specifications. These sorts of transactions should probably be treated as services, as the real value to the customer is the ability to identify and organize relevant information from amidst a sea of otherwise indistinguishable data.46 Sales vs. Rentals As noted above, a further distinction between sales and rental income may be required when the transaction is one in property. The U.S. software classification regulations and the OECD Article 12 Commentary both recognize an important point: that a customer may "rent" a non-physical item, with the principal distinction between a rental and a sale being whether the customer obtains the use of the property for less than its useful life. The same analysis should apply to any item of property acquired in e:commerce. In that regard, the provisions in tax treaties (or elsewhere) that refer to rentals of "tangible personal property" generally also should apply to limited term uses of non-physical property items.

The line between rentals and services also probably should take into account whether property is delivered to the possession and control of the user. In many e:commerce transactions where a customer may be able to access, store or manipulate data on a server owned by the supplier, it could be argued that the customer rented the use of, or at least space on,

the supplier's equipment. While one might argue that a distinguishing feature of electronic commerce is that it allows multiple customers to rent a single property simultaneously;. the more appropriate analogy would seem to be that the server, software or database comprises the capital investment required to perform a service business, where the business does not involve deliveries to users of separate and distinct items of property.

Advertising Revenue It is worth mentioning that much of the revenue that is derived from e:commerce at present is not derived from transactions with end-user customers at all, but is, instead, derived from on-line advertising by third parties. Characterization of this revenue does not appear to present a particularly difficult challenge, however. Such revenue would clearly fall within the business profits category for the application of treaties, and should probably be treated as akin to service revenue for most other purposes.4 Predominant Character Rule Many transactions in digital content will exhibit both property and services characteristics. Allocation of value between these components will be difficult, if not impossible. These issues are not new to e:commerce, however. For example, some amount of labor goes into the manufacture or preparation for sale of nearly all tangible items. And yet sales of those items are characterized strictly as transactions in goods, not services. Similarly, the provision of a memorandum containing legal advice to a client is treated as a transaction in services, even though the paper on which the memorandum is contained is actually "sold" to the client as part of the transaction. Creation of a dam or an oil drilling platform, circumstances addressed in Atkinson and in Rev. Rul. 86-155, provide additional (and more difficult) examples of transactions that exhibit both property and services characteristics.

In Atkinson, the U.S. Tax Court determined that the taxpayer's gross receipts from constructing a dam should be treated like services revenue because the taxpayer's function "was primarily performing a service." 48 Similarly, in discussing whether income from constructing an oil drilling platform should be income from the sale of goods or income from services for subpart F purposes, the IRS explained that income should be classified "in accordance with the predominant character of the transaction." 49 The U.S. Treasury regulations under subpart F also provide for a predominant character rule where portions of income from a single transaction that are of different categories cannot be segregated from one another.50 Where similar cases arise in the e:commerce context, the use of a predominant character rule would be appropriate in order to allow the taxpayer to characterize the entire transaction according to its dominant nature. SOURCING OF INCOME Introduction The source of an item of income may affect which country has jurisdiction to impose tax on that income. It may also affect the application of other rules of taxation, including the foreign tax credit rules. Once the character of income (e.g., as service income, rents, royalties, etc.) has been determined, the rules for sourcing that income generally follow. Source of income principles for rents and royalties tend to be relatively uniform across most tax jurisdictions, although there are considerable differences for income from the sale of inventory property. We have looked, for the most part, to U.S. principles and authorities in the sections that follow. Principles of Source Are Fairly Straightforward for Many E:commerce Transactions

In general, there is no need to create new sourcing rules in order to handle e:commerce transactions. Rather, the traditional concepts can be applied. This is the approach of the U.S. software classification regulations, which do not purport to create any new sourcing rules for transactions in software, but rather provide cross-references to the relevant existing sections of the Code.

Certainly, source rules that depend upon the residence of the payor or the payee (e.g., in the United States, source rules for interest or for the sale of personal property (other than inventory)) can be easily applied to e:commerce, even though the transactions that give rise to the income occur electronically. Similarly, the source rule for sales of inventory (i.e., generally, where title and risk of loss pass) can be applied without difficulty to tangible personal property that is sold electronically but that is delivered by traditional, physical methods.
Of course, passage of title and risk of loss may not be commercially meaningful concepts insofar as the electronic transfer of digitized information is concerned. The U.S. software classification regulations nevertheless refer to the traditional title passage rules for sourcing of inventory property. The preamble to the regulations recognizes that "electronic transfer is generally not accompanied by the usual indicia of the transfer of title," but explains, "As to the issue of determining the place of sale under the title passage rule . . ., the parties in many cases can agree on where title passes for sales of inventory property generally." 5'

Thus, the preamble suggests that taxpayers have the freedom simply to designate the location of title passage in their agreements.2 Where there is no passage of "title" from a commercial perspective, the preamble apparently assumes that the parties still can designate a delivery term that would define the passage of title and risk of loss, and therefore determine source of income. Presumably, taxpayers could not choose any place in the world for title passage, but rather would have to choose a location that had some connection to the transaction, i.e., where the goods were at some point located and could reasonably change hands.53 This focus on contractual arrangements, while it may lead to complications in some instances, could be applied to electronic transfers of digital information other than software, as well. In Services Cases, the Guiding Principle Should Be That Income Is Sourced Where It Is Created, Not Where the Consumer Is Located The sourcing of services income may be more difficult to determine in the realm of e:commerce than in the conventional world. Generally, income generated from the rendition of services is sourced where the services are rendered.? Historically, service providers had to be physically located at the same place as the consumers of their services at the time that services were rendered. This principle has been eroded, however, with innovations in telecommunications. For example, lawyers have been able to provide services to clients in other countries via telephone and fax for quite some time. The development and expansion of e:commerce will increase the ability of service providers to use electronic means to perform services without being face-to-face with their customers. For example, physicians can remotely make diagnoses and prescribe treatment for patients located in other countries via electronic sensors and

videoconferencing.

Architects can work with customers in distant locations, delivering drafts of blueprints over the Internet. Data access and data processing transactions can be supplied from databases and servers located anywhere in the world.
The fact that service providers can utilize electronic means to provide their services over longer distances does not change the basic concept of "source" with respect to those services. The source of income, including services income, should be determined by reference to where that income is actually generated, i.e., where value is created. As the U.S. Board of Tax Appeals (now the U.S. Tax Court) has explained, [The source of income] is not a place, it is an activity or property. Thus, if an [item of] income [is to] be taxed [in the United States] . . the property or activities out of which the income issues or is derived must be situated within the jurisdiction so that the source of the income may be said to have a situs in this country.55 Thus, even where services are consumed in a place other than where they are produced, the place where the service provider is located when he performs the activities for which the customer is paying should govern the source of that income. The place where the consumer of those services is located is immaterial to the analysis. Determining the source of advertising revenue is particularly important for companies engaged in e:commerce, as advertising is a significant source of revenue for many of the commercial ventures on the Internet. The most relevant authority regarding the sourcing of advertising income is Piedras Negras, quoted above. In that case, the taxpayer earned essentially all of its income from the sale of advertising time on a radio station that broadcast from a transmitter in Mexico, just over the border from Texas. Its advertising was clearly targeted towards U.S. listeners, and almost all of its income was earned from advertisers located in the United States. Nevertheless, the Court held that the advertising income was foreign-source income. Thus, the location of the advertisers and the end-users of the broadcast programs (i.e., the listeners) was not determinative of the source of the advertising income. ' It is Important to Determine Which Activities of a Service Provider Are Relevant to Ascertaining Where Its Income Is Generated Deciding that income from the provision of services via e:commerce should be sourced by reference to the activities of the service provider rather than by the location of customers does not end the sourcing analysis. An enterprise may undertake a variety of activities in a variety of different places, all of which are related in some way to the ultimate provision of services to customers. Thus, for example, a company may have R&D personnel in one location. It may have operations personnel in another location. It may have administrative personnel located in yet a third location. And it may have sales and marketing personnel spread throughout the world. Moreover, some or all of these functions may be performed by agents or contractors rather than by employees of the enterprise. It is not always clear which of the activities of an enterprise should be considered relevant to the determination of source. Piedras Negras Piedras Negras, discussed briefly in the previous section, might be erroneously interpreted as standing for the principle that, where revenue is generated from broadcasting, the source of that revenue is dependent only upon the point of transmission of the broadcast. Under this theory, income earned from selling advertising space on websites would be sourced where the website

was transmitted (i.e., at the location of the server hosting the site). The opinion in Piedras Negras does not support this result, however. On the contrary, the Court looked to where value was created for the business, explaining, But for the contracts entered into in Mexico, the radio station therein, and the broadcasts from Mexico, no gain or income would have been realized or received by petitioner from the advertisers in the United States. The property, the power station, and the activities, the radio entertainment at the studio, which originated broadcast programs and advertising, all were in Mexico and without the jurisdiction of the United States.56 Furthermore, the Court stated, "The source [of the income], we think, was the studio and power plant or broadcasting station in Mexico and the labor there employed. With and through them, as instrumentalities, the petitioner employed capital and labor, and earned its income." 57

Based on Piedras Negras, it would appear that income from providing advertising or other services should be sourced by reference to the capital and labor inputs that directly contribute to the production of that income. The location of the server that hosts the website and the people that keep the website in operation are relevant, in part, to this determination, as the server and its operators would be the e:commerce equivalent of the radio station and transmitter operators in Piedras Negras. Equally important to the sourcing question, however, are the locations of the economic activities that lead to the development or acquisition of the content on the website, as those activities would be equivalent to those that produced the radio entertainment in Piedras Negras. Activities of Agents or Contractors In Piedras Negras, all of the activities that were performed in furtherance of the ultimate service provided were performed by the taxpayer itself. In many modern multinational enterprises, however, various inputs will be provided by related or unrelated third parties. Where an entity contracts with third parties for the performance of activities that are inputs to the principal's own provision of services, there is an additional layer of complication in determining whether the activities of those agents or contractors should be considered in applying sourcing principles.

It is clear that there are at least some circumstances under U.S. law where activities of an agent are taken into account in determining the source of income generated by the principal. For example, in Helvering v. Boekman,58 the taxpayer was a Dutch commodities broker who hired a clerk in the United States to perform certain activities. The court was faced with the question whether the taxpayer had performed "personal" services in the United States. The taxpayer argued that he did not perform personal services in the United States because he did not perform them himself. The court rejected this argument, explaining that the clerk provided personal services as the taxpayer's agent. "It can hardly be," the court stated, "that when an alien employs agents in this country to do things from which he collects a profit, Congress intended him to escape, though it meant to tax him, if he came here to do them himself." 59 It is equally clear that the activities of agents will not always be attributable to a principal for purposes of applying sourcing rules. For example, in Perkins v. Comr.,60 an Italian resident executrix hired a New Jersey attorney to represent her in the probate of her husband's U.S. estate. In exchange for her services as executrix, the taxpayer earned a commission from the estate. The IRS argued

that the New Jersey attorney was the taxpayer's agent and that her services as executrix were therefore performed, via the attorney, in the United States. The court disagreed. It held that the taxpayer did not hire the attorney to perform services that she herself was responsible to perform in her duties as executrix. On the contrary, the taxpayer performed services separate and apart from those provided by the attorney for which she received compensation.6' Thus, the Court determined, the commission that the taxpayer received from the estate was not U.S.-source income.62

Thus, it is clear that, in determining the source of income earned by a principal, there are some circumstances under which the activities of an agent employed by the principal will be taken into account, and some circumstances under which the activities of such an agent will not be taken into account. The principles that determine whether and to what extent activities of agents will be deemed relevant, however, is unclear. The case of Le Beau Tours Inter-America, Inc. v. U.S.63 provides an additional fact pattern to consider.

In Le Beau, the taxpayer was a New York corporation that arranged Latin American package tours for American travelers. It contracted with local hotels and tour operators in Latin American countries to provide accommodations, etc. to the travelers. In discussing these arrangements, the Court specifically pointed out that these local service providers "were independent contractors not under [the taxpayer's] legal control other than by contract." 64 Bookkeeping and other clerical work for the taxpayer was performed by its parent, another New York corporation, for an annual lump sum fee. The Court determined that the taxpayer's income was income from providing services to its customers.65 In determining the source of that income, the Court declined to consider the activities of the foreign hotel and tour operators. It did, however, explicitly include in its consideration the bookkeeping and other activities performed by the taxpayer's parent.66 None of the courts in the above-mentioned cases purported to set forth any rules of general application insofar as attribution of activities from agents or contractors to principals for sourcing purposes is concerned. And it is not obvious what general principles can be derived from those cases. On the one hand, perhaps a distinction can be drawn between activities that are integral to the services that are consumed by the customer or client, and activities that are merely ancillary or incidental to those services. Thus, for example, the clerk in Boekman took the customer orders that directly gave rise to the taxpayer's commissions. In contrast, in Perkins, the Court relied on the fact that the attorney's services were distinct from those of the taxpayer-executrix, and the attorney's compensation did not come out of the commission paid to the taxpayer. On the other hand, it is somewhat difficult to fit the Le Beau decision into this framework, since bookkeeping and clerical activities would seem to be a relatively unimportant and peripheral component in the creation of value for the tourist customers. Moreover, the Court in Le Beau did not take into account the activities of the actual tour operators, whose services were clearly key insofar as the tourist customers were concerned.

Perhaps it is the independence of the agent that is important. Such a rule would be harmonious, to some extent, with the agency test for permanent

establishment. Certainly, the Court took pains to mention the independence of the foreign tour operators in Le Beau, whose activities were not attributed to the taxpayer for purposes of applying source rules. The opinions in Perkins and Boekman arguably fit such a rule, as well. It seems likely that the agent in Boekman did not work for anyone other than the taxpayer and was entirely under his control. In contrast, the attorney in Perkins probably had many clients of which the taxpayer was only one, and he likely made many decisions regarding his representation of the estate without direct guidance from her.

Alternatively (or in addition), the substantiality and distinctiveness of the services provided directly by the principal may be relevant. Even if the principal were to acquire inputs that are integral, or even essential, to his rendering of services, there would seem to be a point where the principal renders enough value directly that the source of the ultimate service should not be influenced by the fact that some inputs were acquired from others.

Finally, it may be important to distinguish between those activities that constitute the delivery of the service that the customer is acutally paying for and those activities that are more preparatory rather than part of the delivery of the service. Certain preparatory activities may be too far removed from the ultimate delivery of the service provided to the customer to be considered relevant to determining source. Thus, for example, if an agent performs R&D activities that generate an intellectual property that the principal then uses to deliver a service to customers, those preparatory activities should perhaps be excluded from the determination of the source of the principal's service income.

In any event, it is clear that, in planning transactions with a view towards sourcing concerns, prudent taxpayers should be aware that activities of agents or contractors may be relevant. The Ancillary/Integral and Preparatory/Delivery Distinctions May Be Relevant Even Where the Taxpaying Entity Performs All Activities Through Its Own Employees The discussion in the previous section concerns possible ways to determine when the activities of an agent or contractor may or may not be important in determining the source of services income. It is possible that at least some of those dividing lines should be applicable even where a single taxpaying entity performs all activities through its own employees. Obviously, the criteria of (i) the independence of the agent; and (ii) the substantiality of the activities performed by the principal are not relevant distinctions where there is no agent, but the ancillary/integral distinction may be important, as may be the distinction between preparatory and delivery activities. For example, if a taxpayer provides information services over the Internet to customers located in various locations, and the taxpayer's billing department is located in a country other than where the remainder of its personnel are located, the location of the billing personnel is arguably not relevant. Billing is an activity that is only ancillary to the actual provision of the information services, and it is not an activity for which customers contract directly, even though it is obviously an activity that is necessary to the overall operation of the taxpayer's business. Similarly, if the taxpayer develops special software that allows it to communicate more smoothly with its customers

electronically, the place where the software development takes place should, perhaps, be excluded from consideration of source of the taxpayer's income from customers, as the R&D of the software is just preparatory in nature.

There is little authority indicating that, where a taxpayer performs preparatory or ancillary activities directly (rather than through an agent or contractor), those activities should not be considered important to the determination of source. There is, however, a U.S. regulation indicating that the allocation of compensation for services performed within and without the United States should be determined based on all the facts and circumstances.67 This regulation perhaps should be read to indicate that ancillary or preparatory activities should not be included. Moreover, there is some support for this idea in Piedras Negras itself.68 The court in that case explicitly declined to consider, in determining the source of the taxpayer's advertising revenue, those activities that consisted of sorting mail received by advertisers and dividing the proceeds of remittances received.69 Those activities took place in the United States, but the court did not deem them relevant to its analysis.'o This makes sense under the theory that ancillary activities should not be considered. Although the mail sorting and receipt division were necessary parts of the taxpayer's business, they were only indirectly related to the actual service provided to the advertisers, i.e., the provision of radio programming to listeners."

Where the Activities Giving Rise to Income Are Located in Several Places, Allocation Among Jurisdictions Is Necessary The court in Piedras Negras discounted the minor activities of the taxpayer that did take place in the United States in determining that the income in that case was foreign source.72 Relying on this point, the taxpayer in Tipton and Kalmbach, Inc. v. U.S.,73 attempted to argue that, because the services that it provided in the United States were "merely incidental" to the predominant services that it rendered in Pakistan, all of its income should be sourced outside the United States.74 The Tenth Circuit rejected this argument, explaining that the court in Piedras Negras found that "all of the services [the company] rendered in connection with its business were performed in Mexico."" Thus the court in Tipton determined that the taxpayer's income had to be allocated between U.S. and foreign sources.'6 In Piedras Negras itself, the court specifically pointed out that neither party to the proceeding had raised the question whether the advertising income could have been sourced partly within and partly without the United States." Thus, the court was not forced to deal with the question of allocation of source among jurisdictions.

Under current law, then, where the various activities that give rise to services income (and "other" income that is treated as analogous to services income) are located in multiple locations (and, in accordance with the discussion above, where those activities are relevant to determining source), the source of that income must be allocated accordingly. In fact, the Internal Revenue Code specifically makes reference to "income derived from sources partly within and partly without the United States." 7 Such an allocation might often be administratively burdensome, however, and in some instances seems not to make sense. For example, suppose an information service provider is located in France and provides services to French

customers, but that the French office utilizes billing personnel located in the United States. Current law would seem to require that some small portion of the income of the French office be treated as U.S. source. Circumstances such as these may become more common as developments in telecommunications make decentralization of functions easier. Despite the potential difficulties with allocations, there is no "predominant character" rule for sourcing like the one discussed above for transaction characterization. Nor does there appear to be a de minimis rule that would allow the billing services in the example discussed above to be disregarded. Taxpayers would be wise, therefore, to be aware of source issues in planning multinational operations, and, where functions will be performed in various jurisdictions, they should consider having those functions carried out by separate entities rather than by representatives (e.g., employees, branches, etc.) of a single taxpaying entity.

TRANSFER PRICING Where a multinational enterprise operates in various jurisdictions, it is necessary to determine how to allocate the revenue and expenses of the enterprise to the various locations in which it operates. Most often these issues arise in the context of separate entities within a single enterprise that transact business with one another (e.g., where a manufacturing parent sells products to its subsidiary for distribution) or that benefit from common expenses (e.g., where allocations of management costs to various subsidiaries are required). Transfer pricing issues may also arise within a single entity, however, where that entity has a permanent establishment outside its country of residence.'9

The significance of transfer pricing in the international arena is heightened by the fact that any adjustment to the income of an enterprise in one jurisdiction implies that a corresponding change in another jurisdiction is appropriate. Thus, in order to minimize the risk of double taxation, it is important that international consensus be reached on transfer pricing principles.

Most transfer pricing norms in the international tax arena tend to be based upon the arm's length standard.80 That is, allocations of income among related entities are evaluated in accordance with the way that unrelated parties transacting business with one another would structure their uncontrolled transactions at arm's length.81

The rise of e:commerce may increase the importance of transfer pricing rules and policies, as goods and services can be more easily provided via global collaboration among various entities within a single multinational enterprise. Existing transfer pricing rules should be effective in the e:commerce context, however. Thus, for example, where tangible personal property is sold electronically, the transaction can be readily analyzed in comparison to a typical unrelated buy-sell or agency relationship using the traditional rules for tangible goods (e.g., comparable uncontrolled price method or resale price method). Similarly, where digitized information is delivered electronically, the existing rules for sales of products can be applied. The development of e:commerce will not give rise to any fundamentally new transfer pricing issues, and there is therefore no reason to propose new rules unless and until the current system proves unworkable. It is true that multinational organizations will be able to decentralize

functions further with additional developments in telecommunications and software that allows information to be shared across units of an enterprise. While this may require that transfer pricing rules be applied to more complex circumstances and to more types of transactions, it does not require the use of different rules. Some commentators have suggested that decentralization will lead to a reduction in the availability of comparable transactions that can be used as a standard against which to judge transactions among related entities. Even if this is true, the use of existing methods that allow for evaluation of interrelated transactions in combination can account for these challenges. The profit split method, for example, which is presented both in the U.S. transfer pricing regulations and in the OECD Guidelines, relies less heavily on comparable transactions than some other methods do. The Internal Revenue Service has used the profit split method in advance pricing agreements (APAs) with taxpayers that engage in fully integrated global trading of commodities or derivative financial products.sz In each of these cases, the competent authorities of the United States and a treaty partner entered into an agreement to allocate the income pursuant to the profit split determined in the APA. These agreements demonstrate the value of the profit split method in cases where multiple entities in different jurisdictions all contribute to the profitability of an enterprise in a manner that is difficult to determine on a transaction by transaction basis.

WITHHOLDING TAXES Whether and to what extent withholding taxes will be imposed on a cross-border payment will depend, largely, on how the transaction that gives rise to the payment is characterized. Most countries impose withholding taxes on rents or royalties, but not on other types of income.3 Although many tax treaties provide relief from withholding on these transactions in the way of reduced or zero rates, the administrative burdens of obtaining this relief are often onerous, and may require the acquisition and filing of various certificates of entitlement. Thus, avoidance of withholding taxes is a primary objective of most taxpayers.

In order to avoid withholding taxes on a transaction, it is necessary that the transaction not be considered as giving rise to rent (sometimes) or royalty (always) income. Under existing rules (including their recent interpretations by the U.S. software classification regulations and the OECD Commentary to Article 12), withholding taxes would normally apply to e:commerce transactions only in instances where the parties are dealing in intellectual property rights per se (or rents in some cases), rather than in services or in permanent deliveries of items of property with imbedded intellectual property rights. This limited applicability of withholding to e:commerce is good policy. Because withholding taxes are a surrogate for net income taxes, one of the challenges of withholding in general is to determine how much tax should be deducted from a single payment. The amount withheld should, in theory, approximate the tax that would otherwise be due on the income earned from a transaction. Withholding systems, however, operate by imposing a single flat tax rate on all gross payments of the designated category from customers to suppliers. Withholding taxes, therefore, are most properly imposed on revenue streams that do not have significant variable expenses, such as dividends and interest and, to a lesser extent, royalties. These income streams include relatively consistent levels of profit, and the fact that withholding taxes are

imposed on gross receipts is therefore acceptable from a policy perspective. Most e:commerce transactions do not give rise to pure profit streams. On the contrary, most e:commerce transactions differ from their conventional counterparts only in that they are effected by electronic means. Thus, as with most conventional transactions, gross payments from customers in e:commerce do not necessarily bear any relationship to net income because of variable deductible expenses that may have been incurred in generating customer revenues. E:commerce, therefore, does not generally give rise to the kinds of payments upon which withholding taxes are appropriate, and the threat of any such withholding would present an important disincentive for businesses to make advances in the world of e:commerce.

The withholding tax model is a particularly poor fit for business-to-consumer e:commerce transactions, where an enterprise provides products or services directly to an end-user, as opposed to an intermediate supplier. In order for a system of withholding to operate successfully, the system's withholding agents must be able to perform a variety of tasks, including determining and deducting the correct amount of tax due, remitting that tax to the tax authorities, filing returns, and accounting to suppliers for the amounts withheld. Most consumers do not have the necessary accounting and bookkeeping capabilities to carry out the tasks required of withholding agents as a practical matter. As a result, they will fail to withhold the proper amounts and to remit withheld funds to taxing authorities.

Moreover, a withholding tax system can operate effectively only if the government is able to ensure compliance among withholding agents. Enforcement of withholding duties is difficult where there are numerous different withholding agents or where there are many transactions to monitor. Thus, withholding tax systems can be effective only where transactions tend to be few in number and have large dollar values. E:commerce transactions between businesses and end-user consumers tend to be high-volume, small-value transactions. Because of the large numbers and generally small size of most end-user consumers of e:commerce transactions, tax authorities would have serious difficulties securing their assistance in collecting taxes due from suppliers. To the extent that tax authorities are ultimately unable to collect taxes that are withheld, the primary justification for the withholding system is undermined.

In sum, by analogy to the U.S. Treasury software classification regulations and the Commentary to Article 12 of the OECD Model Treaty, most e:commerce transactions should not give rise to royalty income. Therefore, most e:commerce transactions should not give rise to withholding obligations, particularly in the business-to-consumer context. This result makes sense, and avoidance of withholding on e:commerce transactions should be maintained as a matter of good tax policy. CONSUMPTION TAXES A comprehensive analysis of the consumption tax issues raised by the OECD (briefly summarized in the Background section) is beyond the scope of this article. The authors, however, wish to alert the reader to several aspects of the consumption tax discussion that could affect all areas of e:commerce tax policy. Therefore, some familiarity with these issues is helpful to properly assess the impact of e:commerce tax policy on the reader's areas

of responsibility. The major areas of intersection include the concepts of permanent establishment, VAT "fixed establishment," and state nexus. Transaction characterization for consumption tax purposes, such as the European Commission's (EC) proposal to treat the supply of digital products as services for VAT purposes,84 may adversely affect classification for income, sales, and use taxation. The issues surrounding tax withholding and collection exhibit similarities, as do the proposals to simplify and automate assessment, collection, and remittance functions. The OECD, EC, U.S. Treasury, and the states are all considering each other's activities in search of common solutions. Business tax professionals should have a similarly broad understanding of the various facets of the taxation of e:commerce to reduce the risk of getting whipsawed. The apparent decision by the OECD to adopt the EC's recommendation to tax the supply of digital goods as services for VAT purposes deserves additional attention because it represents an example of a change in existing tax rules to tax e:commerce differently from the equivalent conventional commercial transaction in a manner that, if the supply is taxed in the country of consumption, will increase tax on e:commerce.ss The adverse tax impact of this decision results from three proposals: (1) consumption taxation of cross-border trade should result in taxation in the jurisdiction where the consumption takes place; (2) the supply of digitized products should not be treated as the supply of goods; and (3) countries should examine the use of reverse charge, self-assessment or other equivalent mechanisms.

Taxation by the jurisdiction in which consumption takes place would be a significant change from the current default "origin method" of applying VAT to services that generally results in taxation in the jurisdiction of the supplier for supplies made to non-businesses, and would amount to the wholesale adoption of the current limited scope "place of performance" rule. Digital products forced into the non-goods (service) classification (e.g., digital books and music) would be taxed differently from their conventional tangible counterparts. In certain circumstances, the digital equivalent of conventional transactions (e.g., newspapers) would be subject to higher VAT. Finally, taxation by the jurisdiction of consumption, combined with the inability to require individual consumers to self-assess VAT (the "reverse charge"), would create VAT obligations for many small e:commerce businesses located outside of the jurisdiction. This policy would create onerous VAT registration, collection and remittance obligations for many e:commerce start-ups located in jurisdictions with no VAT and that have no mechanism to comply with this obligation. The authors urge the EC and the OECD to reconsider this decision, especially because the transactions most affected, online sales of digital products and services to individual consumers, represent an insignificant percentage of e:commerce and a correspondingly small amount of tax base erosion. NEXT STEPS The future course of the work on the proper tax policy for e:commerce will depend in part on the future direction of e:commerce business models. Over the past several years we have witnessed dramatic changes in the e:commerce opportunities pursued by entrepreneurs, from the early pursuit of subscription fees for content and Internet access to the current focus on advertising revenue and transaction fees. The authors expect the pace of business innovation to accelerate over the next several years, so tax policy discussions will have to accommodate continued changes in transactions, structure, and technology. Even with this uncertainty, we

believe that the e:commerce tax policy efforts will continue to focus on four major areas: (I) OECD efforts to achieve an international consensus on both income and consumption taxes; (2) the EC's efforts to develop an appropriate VAT policy for e:commerce transactions in the EC; (3) OECD member countries efforts to develop their own national tax policy for e:commerce and to influence their trading partners; and (4) the U.S. State and local government's efforts to develop tax policies to address both e:commerce and traditional forms of remote commerce.

The OECD work will probably focus on the five areas of: (1) income characterization; (2) permanent establishment/ income attribution; (3) consumption tax; (4) tax administration; and (5) authentication/digitized records. Businesses will participate in the Technical Advisory Groups (TAGs) expected to be formed in early 1999. The proposed timeline is for the TAGs to complete their work during 2000. In addition, the OECD's work on "Harmful Tax Competition" may influence the e:commerce work, and vice versa, because e:commerce revenue could certainly be considered the type of geographically mobile income that is an area of focus for the tax competition project. The EC will continue to pursue resolution of issues related to the application of VAT to e:commerce. EC members are concerned that non-EC companies will earn significant revenue from EC individual consumers while escaping EC VAT. The EC's proposal to treat the supply of digital goods as services, apply VAT at the place of consumption, and limit the reverse charge mechanism to VAT registered entities, creates potential EC VAT registration obligations for many non-EC e:commerce businesses and may result in e:commerce transactions bearing a greater VAT burden than their traditional commercial equivalents. The EC's decision to schedule a meeting between the EC's DG XXI and business representatives for January 13, 1999 in Brussels indicated the EC's intention to move quickly to resolve VAT issues. Certain OECD member countries have already made significant progress towards developing their national e:commerce tax policies and will continue their efforts in 1999. The U.S. Internal Revenue Service's Electronic Tax Administration Advisory Commission (ETAAC) will help the IRS improve its electronic filing, payment and tax administration capabilities. The U.S. Treasury may consider expanding the principles included in its computer program classification regulations to the broader e:commerce environment. Australia, Canada, the U.K. and many other OECD members will build upon their past work to advance their policies.

The work of two groups is expected to drive activity in the U.S. state and local area. The Advisory Commission on Electronic Commerce created by the ITFA has less than 15 months to complete its work and submit its recommendations to Congress. Although this statutory deadline may be extended, the Commission will clearly be trying to complete much of its work in 1999. The ITFA encourages the Commission to work with the second group, the National Tax Association (NTA) Communications and Electronic Commerce Tax Project. The Project participants recognize the importance of working with the Commission and are working toward developing a set of consensus recommendations by July 1999 for submission to the Commission. The Project is expected to focus next on scope -- whether to include both sales tax and business activity taxes in the Project's recommendations. CONCLUSION The debate over taxation of e:commerce has been quite positive to date. Many governments, and organizations like the OECD, are taking a

long-term view of both the appropriate tax policies, and the role of tax authorities with respect to e:commerce. The U.S. Department of Treasury set the stage for resolving many potential e:commerce tax issues with software regulations that properly classify software revenues for packaged product but also for electronically transmitted software. The OECD has analyzed software revenue characterization in a similarly well reasoned fashion. Early in the debate, the Treasury released a very good analysis on the policy implications of global e:commerce. Many other countries have also done extensive analysis of e:commerce tax issues (Canada and Australia are two of many fine examples). Also, despite the fact that it is not an international tax bill, it must be noted that the Internet Tax Freedom Act is very appropriate and timely legislation coming from the U.S. Congress. The OECD has engaged the business community in a productive dialogue on the taxation of e:commerce. It is only through such dialogue that proper tax policy and administration may continue. The authors believe that this positive regulatory and legislative environment is a direct result of the infectious enthusiasm generated by the Internet and the desire to grow this remarkable but fragile business model. The potential appears enormous for developing as well as developed countries. For e:commerce to continue to thrive we must create tax rules that are clear, easily administered, and no more economically burdensome than the current systems of taxation. The saying that "the power to tax is the power to destroy" is more true today than ever before. Withholding taxes, or even the paperwork associated with exemptions from withholding tax, would create a paper deluge that even the most sophisticated corporations would be incapable of handling. Current tax administration practices should be streamlined to take into account the nature of e:commerce transactions; that is, numerous small value transactions that cross international boundaries. And, for the first time ever, small businesses may be exploiting these opportunities like never before. Because of the nature of these transactions new ways of administering the old rules may be necessary. For example, it would be very helpful to make clear that withholding does not apply to transactions and/or to eliminate the need to file an exemption certificate. Another possibility would be to make electronic compliance with tax requirements more readily available. This seems quite feasible. Many tax authorities are not only embracing e:commerce within their jurisdictions but are using it to make tax administration more efficient.

Tax authorities around the world seem energized like never before. Hopefully, the private and public sectors can continue to work together so that the taxpaying public is able to take full advantage of the power of the Internet without overly burdensome tax administration. It is a goal that all sides should embrace.

Footnote:

' Howley v. Whipple, 48 N.H. 487 (1869). 2 This description is drawn from "The Technologies of Electronic Commerce: The Integrity of Electronic Transactions and Digital Records for Tax Administration and Compliance," a Study Prepared for the Electronic Commerce Tax Study Group by PriceWaterhouseCoopers LLP, Aug. 1998.

Footnote:

3 ID.

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4 Forrester Research, Jan. 1999. (Internet sales only. GDP percentages are estimated based on Apr. 1998 gross GDP data, so are probably overstated.)

' Electronic Commerce and the Role of the WTO - Special Studies, The World Trade Organization, Marc Bacchetta, Patrick Low, Aaditya Mattoo, Ludger Schuknecht, Hannu Wager, Madelon Wehrens, Apr. 1998.

6 Forrester Research, Apr. 1998 (most recent data available to the authors). The Forrester Research Jan. 1999 data estimates total business to consumer (both online and offline delivery) Internet sales to represent 10% of total 2001 U.S. Internet sales. Thus, the online delivery of digital products remains insignificant as a percentage of GDP.
Footnote:

' "Electronic Commerce: The Challenges To Tax Authorities and Taxpayers," prepared by the Organization for Economic Cooperation and Development (OECD) for an Informal Roundtable Discussion between Business and Government; Turku, Finland (Nov. 18, 1997).

Footnote:

' Regs. 1.861-18, Classification of Transactions Involving Computer Programs (T.D. 8785, 1998-42 I.R.B. 5). All section references are to the Internal Revenue Code, as amended, and the regulations thereunder, unless otherwise specified.

9 Prop. Regs. 1.861-18, Classification of Transactions Involving Computer Programs (REG-251520-96, 11/13/96).

Footnote:

'Q Selected Tax Policy Implications of Global Electronic Commerce, Department of the Treasury, Office of Tax Policy, Nov. 1996.
" The Tax Man Cometh to Cyberspace, Jeffrey Owens, Head of Fiscal Affairs, OECD, The International Tax Programme Symposium on Multi-Jurisdictional Taxation of Electronic Commerce, Harvard University, Apr. 5, 1997.

Footnote:

t2 Tax and the Internet, Discussion report of the Australian Taxation Office Electronic Commerce Project Team on the challenges of electronic commerce for tax administration, Aug. 1997.

Footnote:

""Electronic Commerce: The Challenges To Tax Authorities and Taxpayers" prepared by the Organization for Economic Cooperation and Development (OECD) for an Informal Roundtable Discussion between Business and

Government; Turku, Finland (Nov. 18, 1997).

Footnote:

"OECD Electronic Commerce Informal Working Group Ottawa, Ontario, Apr. 1-2, 1998.
"OECD Informal Meeting with Business on the Tax Administration Issues Associated with Electronic Commerce, Paris (Apr. 21, 1998).

16 Draft Discussion Paper on Tax Administration Issues in Electronic Commerce, Secretariat of the Committee on Fiscal Affairs (Apr. 21, 1998).

Footnote:

"Permanent Establishments and Other Tax Treaty Issues Related to Electronic Commerce, OECD, Washington (May 14, 1998).

I Note on Tax Convention Issues Arising from Electronic Commerce, Secretariat of the Committee on Fiscal Affairs, May 1998.

19 OECD Informal Meeting with Financial Institutions and Payment System Processors Concerning Electronic Commerce, Paris (June 10, 1998).

o Electronic Commerce and Canada's Tax Administration, A Report to the Minister of National Revenue from the Minister's Advisory Committee on Electronic Commerce, Apr. 1998.

Footnote:
2' Regs. 1.861-18, Classification of Transactions Involving Computer Programs (T.D. 8785, 1998-42 I.R.B. 5).

22 For a thorough discussion of the final regulations, see Gary D. Sprague, Esq., Robin A. Chesler, Esq., and Rachel Hersey, Esq., PhD, "The Final Software Revenue Characterization Regulations," 28 Tax Mgmt. Int'l J. 59 (Feb. 12, 1999).

2 OECD Government/Business Dialogue on Taxation of Electronic Commerce, Hull, Quebec Canada (Oct. 7, 1998).

Footnote:

24 Revision of the Commentary on Article 12 Concerning Software Payments, OECD Committee on Fiscal Affairs (Sept. 29, 1998).

" Electronic Commerce: A Discussion Paper on Taxation Issues, a discussion paper prepared by the OECD Committee on Fiscal Affairs (Oct. 10, 1998).

Footnote:

26 But see discussion, above.
27 Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, H.R. 4328, Division A - Omnibus Consolidated Appropriations, Title XI Moratorium on Certain Taxes.

Footnote:

28 See, e.g., OECD Model Treaty, Article 5.

Footnote:

29 Paragraph 10 of the Commentary to Article 5 provides that a permanent establishment may . . . exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of the personnel being restricted to setting up, operating, controlling and maintaining such equipment.

30 Compare the discussion of gaming and vending machines in the Commentary to the OECD Model Treaty. The Com

Footnote:

mentary notes that, where an enterprise merely sets up such machines initially, and then leases them to other enterprises no permanent establishment exists. On the other hand, the Commentary provides that a permanent establishment "may exist" if the enterprise that sets up the machines also operates and maintains them for its own account. Paragraph 10 of the Commentary to OECD Model Treaty, Article 5. Vending or gaming machines are unlike servers, however, in that the gaming or vending machines may in themselves constitute a business operation. In contrast, a server, like telephone equipment, is merely a communications device.

Footnote:

"See Electronic Commerce: The Challenges to Tax Authorities and Taxpayers, An Informal Round Table Discussion between Business and Government, OECD, Turku, Finland (Nov. 18, 1997).

Footnote:

32 In the sales and use tax context, the U.S. Supreme Court determined in Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992), that an out of state mail order company with no retail outlets, solicitors, or property within the taxing state could not be required to collect and pay use tax on goods sold to residents of the state. Thus, some form of physical presence was required in order to satisfy U.S. Constitutional requirements. The applicability of the physical presence requirement for income tax purposes, however, is less clear. The Quill Court expressly stated that it was not ruling on whether the same physical presence bright-line standard applied to other types of tax. In 1993, the South Carolina Supreme Court ruled that a Delaware holding company was subject to income tax in South Carolina where its only connection with the state was that it licensed intangible property rights to a licensee in the state. Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E.2d 13 (S.C. 1993). The U.S. Supreme Court denied certiorari in the case. 114 S. Ct. 550 (1993).

"This is true even where it is clear (as a result of Quill) that some level

of physical presence is required. For example, in Orvis Company, Inc. v. Tax Appeals Tribunal of the State of New York, 655 N.E.2d 954 (N.Y. 1995), an out of state corporation sold goods to retail customers in New York via mail order, and it also sold goods at wholesale to New York retailers. The company's employees traveled to New York 12 times during the three-year audit period to ensure that orders were properly delivered to wholesale customers. The New York Court of Appeals held that this "systematic visitation" by employees was sufficient to create a nexus for purposes of requiring the company to collect use tax. This activity would not rise to the level of a permanent establishment under most treaties.
Footnote:

34 E.g., OECD Model Treaty, Article 21. "See 861-865. "See 954(a).

Footnote:

37 Although "other" is not an enumerated category for purposes of determining source of income under U.S. law, it is well settled that the the categories enumerated in the sourcing rules are not intended to be all inclusive. Bank of America v. U.S., 680 F.2d 142, 147 (Ct. Cl. 1982), citing Helvering v. Suffolk Co., 104 F.2d 505 (4th Cir. 1939) et al.; Hunt v. Comr., 90 T.C. 1289, 1301 (1988). Where a type of income is not specifically provided for, courts have tended to source the income by analogy to the rules provided for those categories of income that are addressed in the Code. E.g., Bank of America 680 F.2d at 147; Howkins v. Comr., 49 T.C. 689, 693-94 (1968) (sourcing alimony income in accordance with residence of the obligor by analogy to interest income). 83 T.C. 584 (1984).

In fact, the Boulez case demonstrates that double taxation does occur in the absence of consistent characterization rules among nations. The United States claimed that the compensation paid to Boulez was compensation for personal services, while Germany took the view that the compensation represented royalties that were exempt from U.S. tax. Boulez sought relief from the competent authorities of the two countries, but no agreement could be reached. Thus, Boulez was subject to double taxation on his income, notwithstanding the provisions of the tax treaty. See Boulez, 83 T.C. at 588. ' Id. at 590-96. See also Ingram v. Bowers, 57 F.2d 65 (2d Cir. 1932) (contract to create copyrighted musical work gave rise to services income); Karrer v. U.S., 152 F. Supp. 66 (Ct. Cl. 1957) (services income generated by taxpayer hired to create a patented invention). ' 82 T.C. 275 (1984).

Footnote:

'=The ultimate question in Atkinson was whether the taxpayer's "gross income" (as that term was used in connection with the Western Hemisphere Trade Corporation deduction) should be equal to gross receipts, or whether its gross receipts should be reduced by costs of goods sold (or costs of operations) in order to determine gross income. The Court in that case determined that that taxpayer's gross receipts from constructing a dam did not need to be reduced by input costs because the taxpayer's income was from services rather than from the sale of goods. Id. at 298. See also Rev. Rul. 86-155, 1986-2 C.B. 134 (discussing whether income from constructing

an oil drilling platform should be income from sale of goods or income from services for purposes of subpart F). 43 Regs. 1.861-18 (T.D. 8785, 63 Fed. Reg. 52971 (10/2/98)).

Footnote:

" This is not to say that there are no longer important issues to be addressed by the international community regarding the distinction between royalties and other income. On the contrary, there may be jurisdictions that still take the position that all transactions involving on-line delivery of digitized information give rise to royalty income. It is important that international consensus on the character of these transactions be reached and that continued efforts be made in this regard, particularly in those countries that tend to take a more formalistic approach to transaction characterization.

Footnote:

"Section 7701(e) may also provide useful guidance in the e:commerce arena. It provides some factors to be taken into consideration in determining whether a contract that purports to be a services contract should, instead, be treated as a lease of property. Those factors include (i) whether the service recipient is in physical possession of the property; (ii) whether the service recipient controls the property; (iii) whether the service provider bears the risk of loss from nonperformance of the contract, et al.

'O Of course, there are many transactions that do not fall neatly into either the goods or the services category. For example, if a customer purchased a database on CD-ROM, it would seem that the transaction should be characterized as a sale of goods. If the customer accesses the same database online, then, there is some intellectual consistency in treating the transaction as a rental of that database rather than as a service.

Footnote:

47 Cf. Piedras Negras v. Comr., 43 B.T.A. 297 (1941) (sourcing broadcasting revenue by looking to where radio station's studio and power plant were located and where its personnel performed services).

Footnote:

48 Atkinson v. Comr., 82 T.C. at 298. 49 Rev. Rul. 86-155. 1986-2 C.B. at 135. 5 0Regs.(sec) 1.954-1(e)(3). Cf. Rev. Rul. 64-56, 1964-1 C.B. 133 (transfer of property in exchange for stock is tax free pursuant to(sec) 351 even if some services are provided in connection with the transfer so long as the services "are merely ancillary and subsidiary to the property transfer").

Footnote:

63 Fed. Reg. 52971, 52973 (1998). 52 This emphasis on the terms of the contract between the buyer and seller can be a trap for the unwary, as taxpayers will need to create a title passage or delivery term for tax

purposes when the agreement normally would not include such a term as it is not a commercially material item. For further discussion of this issue in the software context, see Sprague, Chesler and Hersey, "The Final Software Revenue Characterization Regulations," 28 Tax Mgmt. Int'l J. 59 (Feb. 12, 1999). 53 This would likely be the location of the buyer or the location of the seller.

Footnote:

' E.g., 861(a)(3), 862(a)(3).

ss piedras Negras Broadcasting Co. v. Comr., 43 B.T.A. 297, 309 (1941), nonacq., 1941-1 C.B. 18, aff'd, 127 F.2d 260 (5th Cir. 1942), quoting Paul and Mertens, Law of Federal Income Taxation, vol. 4 at 350. See also Howkins v. Comr., 49 T.C. 689, 694 (1968) ("Congress thought of the 'source' of an item of income in terms of the place where the income was 'produced' ").

Footnote:

61 Id. at 312. " Id. at 313.

Is 107 F.2d 388 (2d Cir. 1939).

Footnote:

59 Id.at 389 60 40T.C. 330(1963),1964-1(partI) C.B.5. 61 Id.at 344. 62 Id.at 345 63 415 F.Supp.48 (S.D.N..Y.),aff d, 547 F.2d 9(2d Cir. 1976). 64 Id.at 50. 65 Id.at 52 66 Id. l

Footnote:

67 Regs. 1.864-4(b)(1)(i).

" But see discussion of Tipton and Kalmbach, Inc. v. U.S., below.
Footnote:

69 Piedras Negras, 43 B.T.A. at 307. 70 Id. 71 Id.

72 Id. at 308.

73 480 F.2d 1118 (lOth Cir. 1973). 74Id. at 1120.

75 Id., quoting Piedras Negras, 127 F.2d at 261. The Tipton court was correct in this regard only if its statement is read as referring only to those activities that the taxpayer in Piedras Negras provided to advertisers. Clearly, the Piedras Negras court did not find that all of the taxpayer's activities were performed in Mexico. It simply declined to consider those activities that were performed in the United States as relevant to the question of source. 76 Id.

77 Piedras Negras, 43 B.T.A. at 313-314.

Footnote:

' 863(b).
79 Article 7 of the OECD Model Treaty provides that, where an enterprise has a permanent establishment in a country, only those profits that are "attributable to" that permanent establishment (on an arm's length basis) are taxable there.

Footnote:

80 This is in contrast to the formulary methodologies adopted in most states within the United States. See Permanent Establishment Rules, above. The OECD Transfer Pricing Guidelines specifically reject formulary apportionment as an alternative to the arm's length standard. OECD Transfer Pricing Guidelines, Chapter 3, Paragraph 3.63. " See OECD Model Treaty, Article 9. 82 See Notice 94-40, 1994-1 C.B. 351.

Footnote:

83 Many countries also impose withholding on payments made in exchange for services, particularly less developed countries. These rules are subject to overrides by treaties in many cases.

Footnote:
ea Interim report on the implications of e:commerce for VAT and Customs, Working Party No 1 on the Harmonization of Turnover Taxes, European Commission, Directorate General XXI (Apr. 3, 1998).

85 The following discussion is based in part on an article by Sanderson, et al., "Consumption Tax Treatment of Electronic Commerce: Issues and Policy Recommendations," Price Waterhouse, Tax Notes Int'l 1083 (4/6/98).

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THIS IS THE FULL-TEXT. Copyright Tax Management Inc 1999

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DeCONCINI INTRODUCES ROYALTY BILL IN SPIRIT OF COMPROMISE
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Royalties on home taping still make him uncomfortable, but Sen. DeConcini (D-Ariz.) said Thurs. at news conference that he felt compelled to support industry compromise to resolve digital audio home taping dispute. Our understanding was that bills (S-1623, House unnumbered) embodying landmark compromise first reported by Audio Week (AW July 8 p1) were introduced in House and Senate before close of week's business Fri. Besides DeConcini, who is chmn. of Copyright Subcommittee, principal backers were as we were first to report 2 weeks ago (AW July 22 p1). They include: DeConcini's counterpart in House, Rep. Hughes (D-N.J.); House Judiciary Committee Chmn. Brooks (D-Tex.); Senate Communications Subcommittee Chmn. Inouye (D-Hawaii); half-dozen others.

At news conference, DeConcini conceded he still dislikes royalties, which are at heart of industry accord, but was willing to compromise since industry was in agreement: "I can live with that." More important, he said, was fact that bill's passage would benefit consumers dramatically in removing any illegality or stigma on home taping of digital and analog audio works. He described measure as fair and equitable for providing compensation and benefits for hardware and software manufacturers, consumers, music industry: "This bill is a tremendous breakthrough." In "context" of compromise, he said, concept of royalties "does not offend me."

Lawmakers were reluctant, however, to say when legislation would gain attention on their panels, with Hughes merely expressing "hope" that it will be this year. Hughes panel is tied up currently with reforms in criminal justice system. Brooks also indicated hope for "expeditious" consideration. He called legislation "a win-win situation," noting that consumers will gain access to new technologies, copyright interests will "get just compensation," and manufacturers "get a market for their products." Pact's bottom line is that "all parties can get out of the courts," Brooks said. DeConcini also was noncommital on timing of hearings and markup.

DeConcini acknowledged Congress has lingering concerns about ability of Copyright Office and Copyright Royalty Tribunal to handle existing and proposed new loads, but said that if it's merely question of resources, he would be among those to ensure "appropriate" federal funding. "I couldn't say for any certainty whether the Copyright Office could handle this new load," DeConcini said, "but if funding concerns arise, we will cope with that problem," he said. Recording Industry Assn. of America Pres. Jay

Berman, among others, has said he's confident Copyright Office will meet administrative challenges "adequately.".

At our deadline, our quick read of House bill confirmed no substantial changes had been made in content of legislation from confidential draft we obtained month ago. Sponsors did drop word "digital" from official title, with bill now known as Audio Home Recording Act of 1991. Also deleted was 5-point preamble summarizing legislation's benefit to consumers and point that "it would be desirable for other countries to adopt measures similar to the technical restrictions and royalty requirements of this Act."

After some hesitation, Home Recording Rights Coalition (HRRC) officially endorsed royalty legislation on ground that compromise "reaffirms" right of consumers "to make noncommercial recordings in the privacy of their own homes." Wearing hat of HRRC chairman, EIA Consumer Electronics Group Vp Gary Shapiro said in letter to Senate sponsor DeConcini that group believes "on balance the legislation will promote consumer interests by reaffirming consumer rights that have been under constant legislative and legal challenge, spurring music industry enthusiasm for new formats, and enhancing new product choices open to consumers." HRRC endorsement had been expected, pending poll of members, since group issued generally favorable statement on royalty pact 2 weeks ago (AW July 22 p2).

Ripple effect of U.S. compromise on digital audio home recording royalties was most visible in Tokyo last week, where activity on issue has been frenetic since stateside pact was announced July 11. American initiative spawned bevy of news reports about imminent royalty compromise in Japan, where hardware manufacturers have resisted levies for years. Nikkei report said Education Ministry's Agency for Cultural Affairs, govt. body with jurisdiction over copyright matters, plans to submit royalty proposal to Ministry of International Trade & Industry (MITI) by end of Sept. Report, quoting unnamed govt. sources, cited "trends in Europe and the U.S." as having spurred Agency to seek revisions, noting MITI has expressed "apparent support" for levies. However, MITI spokesman told our Tokyo correspondent that Nikkei account was "overspeculative," although spokesman conceded royalty discussions in Japan have become more "active" in wake of U.S. developments. Still unclear is position of hardware manufacturers. As we reported, EIAJ Chmn. Moriya Shiki recently sidestepped reporters' requests for clear policy statement (AW July 22 p2), other than to suggest need to "consider consumers' opinions fully" before plan is established. Matsushita Japan spokesman said only that company is studying matter closely. Milestone Sony statement released July 11 pledging to "actively support" U.S. royalty legislation served as strong basis for settlement in year-long class action DAT suit brought by music publishers and songwriters (AW July 15 p4).

While Sens. DeConcini and Inouye were expected as main Senate sponsors of royalty bill, initiative won endorsement of others, including Sen. Gore (D-Tenn.). Office of long-standing royalty supporter issued news release recalling that 3 years ago he had "fought hard to prevent the importation and sale of equipment that would have resulted in the wholesale piracy of music." Proposals in House and Senate in 1988 ultimately spawned National Bureau of Standards study of CBS Copycode system and "definitive" report on home audio taping by Office of Technology Assessment (AW Oct 30/89 p1). Gore had been highly vocal proponent of songwriters' rights in 1988 hearings. "As a result of the efforts of Sen. Gore and others," said news

release, "the music industry and the audio equipment manufacturers were forced to negotiate, recently reaching an agreement that is reflected in the legislation being introduced... " Release quoted software principals, including Songwriters Guild of America Pres. George Weiss, as praising Gore's efforts. "This legislation is a tribute to the industry and to the Congress and no one worked harder to bring all the parties to this point than Senator Gore," Weiss was quoted as saying.

Copyright Office, agency that would collect digital audio royalties from hardware and blank media companies (AW July 8 p3), issued new regulations that would give cable systems and satellite carriers "additional option" of paying royalties by electronic funds transfer. Secondary cable transmissions of broadcast signals and "certain" secondary satellite transmissions to home dish owners are subject to royalty payments, which are submitted to Copyright Office every 6 months (by comparison, home recording levies would be payable quarterly). Previously, payments were made in form of certified check or money order, but new provision for electronic funds transfer "should facilitate payment by cable systems and satellite carriers and lessen the administrative burden of the Copyright Office," said announcement in Federal Register. Royalties will go directly to U.S. Treasury, "streamlining" current process of sending checks to Copyright Office to be forwarded to Treasury. Digital recorder bills make no stipulation as to form of payment required, only that payment must accompany quarterly and annual "statements of account" documenting shipments on which levies would be assessed.

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Liberty Vs. Royalties
Frank Ahrens
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Here's a story that will either (a) make your spirit of individual liberty soar, as you read about one person taking a stand against the corporate oligarchy, or (b) curdle your blood at the thought of a laughing scofflaw, crushing the livelihood of musical artists. It's about Internet music, which sounds dull. But it's really a morality play about your right to hear the music you want -- and how that may radically change, thanks to forces currently in motion. Let's use the story of a clever high school lad to illustrate. My friend's son had a classmate with a business model. Students would give this young man a list of requested songs and a small amount of cash, usually about $5. In return, the boy would go to the Internet, access one of the many free song-sharing sites and find the songs on his customer's list. Then, he'd burn the songs onto a blank CD and give the completed disc to his fellow student. Customers got a digital-quality collection of the songs they wanted at a price that's about $10 less than the cost of a retail CD. Essentially, this kid was his own record label. It's the perfect music business. Except for one major bummer: It is entirely illegal, and it indirectly takes food out of the mouth of each musician who recorded a song on that pirated disc. This, then, is the point we've come to -- technology now enables each of us to make a mouse-click moral decision about our entertainment. We must ask ourselves: "Where does our sense of fair play intersect with our price point for music?" Music pirates feel justified in stealing music because they believe they've been price-gouged on CDs for years. That's the issue at the heart of a debate that's raging right now, as music conglomerates, consumers, lawyers, congressfolk and broadcasters wrestle with issues such as copyright protection, intellectual property and the rights of individuals to get the music they want. Napster and its kind have been the focus of contention over the past couple of years. Front and center now, however, is the plight of Internet broadcasters. There are hundreds of these tiny webcasters across the country, running Internet-only radio stations, typically out of their homes. Because of a pending decision that has fallen into the lap of the librarian of Congress, many of these tiny webcasters may soon be out of business. The record companies feel the webcasters abet the sort of piracy committed by our shrewd teenager. They want further protections against theft that may eliminate free Internet music. Here's the history: In 1998, Congress passed the Digital Millennium Copyright Act at the behest of the recording industry, which was worried that the Internet would spawn a zillion perfect copies of their songs, none of which artists would be paid for. Radio stations pay royalties for songs, and record companies wanted

webcasters to pay more. Record companies are worried that songs broadcast over the Internet are easier to copy and distribute than songs played over the radio. Therefore, they want webcasters to pay higher fees than radio stations. As a result, in February, the Copyright Arbitration Royalty Panel -- responding to the Digital Millennium Act -- came up with its recommendation on what royalty webcasters should pay if they wanted to keep playing their songs. The rate the panel suggested was 0.14 cents for each song played. This may not sound like much, but let some of the webcasters do the math for you. I got a bunch of them on a conference call last week. "The royalty rate is so astronomically high that it would virtually assure all of the people on this phone call and a significant percentage of other small webcasters would not be able to survive," said Kevin Shively, who runs Beethoven.com, a classical-music webcaster. He and seven other small webcasters -- who nonetheless streamed 40 million hours of listening last year -- booked a combined 2001 gross revenue of $93,000. Here's the fun part: If those same webcasters were forced to pay the royalties set by the copyright panel, it would have cost them $710,000 last year. Not even the most kamikaze venture capitalist would assume that kind of risk. The copyright panel will deliver its royalty recommendation to the librarian of Congress -- the czar of all things copyright -- on May 21. Librarian James H. Billington can accept, reject or modify the proposals, or call for a new panel. The webcasters are fighting to get the rates overturned or lowered. They've got a friend in Rep. Rick Boucher (D-Va.), who has helped draft a letter, signed by 19 other members, urging Billington to set more reasonable royalty rates. "In our view, if the royalty rates or formula stifle an inchoate industry and force hundreds of small webcasters out of business, Congress's goals would not have been met," the members wrote. Yesterday, webcasters silently pounded their bully pulpit. Several of them -- including Hober.com, a Takoma Park folk station -- shut down their streams. "Hober will be silent today in protest of a new government ruling that will force us off the air, after over four years of public-service broadcasting," reads Hober's Web site. (www.hober.com) "While artists should surely be paid, the webcasters like Hober cannot hope to bear the burden alone." On the other side of this issue is the Recording Industry Association of America (RIAA). "We are concerned that if the (royalty) rates are set too low, people will be profiting from music without the artists being compensated," said John Simson, executive director of Sound Exchange, the RIAA division that distributes royalties. What is certain is that the record companies will have to develop a new -- and fairer -- business model for wringing money out of the Internet. The rising audience of Internet radio stations shows that more and more folks are sick of what commercial radio dishes out. The wild success of file-sharing and the decline of CD sales prove that people want a la carte entertainment -- not CDs with two good songs and 10 clunkers. It's not surprising that webcasters -- and our nimble high school entrepreneur -- recognized and acted on this before the record industry did. 2002 The Washington Post Company

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